Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

EDWARD E. ANDERSON
Petitioner,

v.

AMR, The Parent of American Airlines, Inc.;
AMERICAN AIRLINES

Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals for the
Ninth Circuit, Case No. 08-16586 ; and to
The United States District Court for the Northern
District of California, Case No. 07-03527 WHA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Anderson filed this case in state court alleging age and race discrimination, and retaliation under the California Fair Employment and Housing Act (FEHA). It was removed to Federal Court under diversity jurisdiction by his employer.

I. Freedom from age or race discrimination in employment is deemed a civil right under FEHA, and the purpose of FEHA is to protect and safeguard that right, and provide effective remedies to eliminate such discrimination. Did the Lower Court fail to follow FEHA, consistent with this purpose, when it granted summary judgment?

II. Federal Rule of Civil Procedure Rule 56 (c) states that opposition affidavits must be filed before a summary judgment hearing. Did the Lower Court deprive plaintiff of civil rights under FEHA when it retroactively excluded a Supplemental Declaration and exhibits with evidence of discrimination and pretext?

III. The Lower Court concluded there was no triable issue of retaliation under FEHA when Anderson was permanently isolated from fellow skycaps after he complained to his employer and state agencies about the legality of a $2 per bag fee that skycaps were required to collect and pay over to the airline. Did this ruling conflict with controlling State Law?

IV. The Lower Court's retroactive Order excluded questionnaire answers from fellow skycaps regarding unfair, discriminatory treatment of

Anderson, signed in the affirmative, "My answers are true." Was this exclusion in conflict with FEHA discrimination law as applied to summary judgment motions?

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OPINIONS AND ORDERS BELOW

This petition is taken from the Order of the Ninth Circuit Court of Appeals, No. 08-16586, filed November 12, 2009 that denied petitioner's petition for rehearing, and from the Memorandum of the Ninth Circuit of Appeals, No. 08-16586, filed October 14, 2009, that affirmed the Memorandum Decision of the Northern District of California, Case No. 3:07-cv-03527 WHA, that granted summary judgment in favor of American Airlines against Petitioner Anderson.

This petition includes review of the Northern District of California's Order, filed May 19, 2008,that allowed the filing of Anderson's opposition to the Motion for Summary Judgment, and the Court's May 23, 2008 Order that stated, "Any yet further untimely evidence submitted by plaintiff, however, will not be considered," which Order was retroactively applied to exclude evidence filed May 19, 2008.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. Section 1254. The Memorandum Decision of the United States Court of Appeal for the Ninth Circuit was filed on October 14, 2009. Anderson filed a timely petition for rehearing. The Court of Appeals denied the petition for rehearing on November 12, 2009.

RELEVANT STATUTES AND RULES

Because this case was filed in State Court under the California Fair Employment and Housing Act (FEHA) and removed to federal court, the relevant statute and rules are:

From the California Fair Employment and Housing Act

Government Code Section 12920

> It is hereby declared as the public policy of this state that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation. It is recognized that the practice of denying employment opportunity and discriminating in the terms of employment for these reasons foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advancement, and substantially and adversely affects the interest of employees, employers, and the public in general. Further, the practice of discrimination because of race, color, religion, sex, marital status, national origin, ancestry, familial status, disability, or sexual orientation in housing accommodations is declared to be against public policy. It is the purpose of this part to provide effective remedies that will eliminate these discriminatory practices. This part shall be deemed an exercise of the police power of the state for the protection

of the welfare, health, and peace of the people of this state

Government Code Section 12920.5

In order to eliminate discrimination, it is necessary to provide effective remedies that will both prevent and deter unlawful employment practices and redress the adverse effects of those practices on aggrieved persons. To that end, this part shall be deemed an exercise of the Legislature's authority pursuant to Section 1 of Article XIV of the California Constitution.

Government Code Section 12921

(a) The opportunity to seek, obtain and hold employment without discrimination because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation is hereby recognized as and declared to be a civil right.

Government Code Section 12940.

It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:

(a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation of any person, to refuse to hire or

employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment.
* * *

(h) For any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part.

From State Laws prohibiting diversion of tip income

California Labor Code Section 351

No employer or agent shall collect, take, or receive any gratuity or a part thereof that is paid, given to, or left for an employee by a patron, or deduct any amount from wages due an employee on account of a gratuity, or require an employee to credit the amount, or any part thereof, of a gratuity against and as a part of the wages due the employee from the employer. Every gratuity is hereby declared to be the sole property of the employee or employees to whom it was paid, given, or left for. An employer that permits patrons to pay gratuities by credit card shall pay the employees the full amount of the gratuity that the patron indicated on the credit card slip, without any deductions for any credit card payment processing

fees or costs that may be charged to the employer by the credit card company. Payment of gratuities made by patrons using credit cards shall be made to the employees not later than the next regular payday following the date the patron authorized the credit card payment.

From State Law regarding Summary Judgment

California Civil Code Section 437c

(a) Any party may move for summary judgment in any action or proceeding if it is contended that the action has no merit or that there is no defense to the action or proceeding.
* * *

(c) The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the evidence set forth in the papers, except that to which objections have been made and sustained by the court, and all inferences reasonably deducible from the evidence, except summary judgment may not be granted by the court based on inferences reasonably deducible from the evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact.

(d) Supporting and opposing affidavits or dec-

larations shall be made by any person on personal knowledge, shall set forth admissible evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavits or declarations. Any objections based on the failure to comply with the requirements of this subdivision shall be made at the hearing or shall be deemed waived.
* * *

(h) If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication or both that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just. The application to continue the motion to obtain necessary discovery may also be made by ex parte motion at any time on or before the date the opposition response to the motion is due.

Federal Rules for Summary Judgment

Federal Rules of Civil Procedure Rule 56
* * *

(b) BY A DEFENDING PARTY. A party against whom relief is sought may move at any time, with or without supporting affidavits, for summary judgment on all or part of the claim.

(c) SERVING THE MOTION; PROCEEDINGS. The motion must be served at least 10 days before the day set for hearing. An opposing party must serve opposing affidavits be-

fore the day set for the hearing. The judgment sought should be rendered if the pleadings, the discovery, and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.
* * *

(c) AFFIDAVITS; FURTHER TESTIMONY

(1) In general. A supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. If a paper or part of a paper is referred to in an affidavit, a sworn or certified copy must be attached to or served with the affidavit. The court may permit an affidavit to be supplemented or opposed by depositions, answers to interrogatories, or additional affidavits.

(2) Opposing Party's Obligation to Respond. When a motion for summary judgment is properly made and supported, an opposition party may not rely merely on allegations or denials in its own pleadings; rather, its response must –by affidavits or as otherwise provided in this rule –set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.

(f) WIIEN AFFIDAVITS ARE UNAVAILABLE. If a party opposing the motions shows by affidavit, that, for specified reasons, it cannot present facts essential to justify its opposition, the Court may:

(1) deny the motion;

(2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or

(3) issue any other just order.

Federal Rules for Removal

Federal Rules of Civil Procedure Rule 81

(c) REMOVED ACTIONS

(1) Applicability. These rules apply to a civil action after it is removed from a state court.

* * *

(d) LAW APPLICABLE.

(1) State Law. When these rules refer to state, the term "law" includes the state's statutes and the state's judicial decisions.

* * *

STATEMENT OF CASE

In August 2005, American Airlines unilaterally instituted a $2 per bag fee at the San Francisco International Airport. This bag handling fee drastically reduced the tip income of skycaps, who were required to collect the bag fee and turn it over to American. As a result of the reduction in tip income, shift selection and work location became much more important to skycaps than before the $2 per bag fee.

Anderson, age 73, was the oldest skycap working for American. He was entitled to exercise seniority in shift and work location. Due to a combination of attrition, and American not hiring African American skycaps directly or through its independent contractor, Anderson was one of two remaining African American skycaps, and the only African American skycap on his shift. Anderson worked a four hour shift usually at the West end of the passenger loading zone although not always.

Anderson requested reassignment to an available six hour shift at the East end of the passenger loading zone where the passenger traffic was the heaviest and he could earn more tip income in light of the effect of the $2 bag fee. Anderson's request was denied. When Anderson complained about the $2 bag fee and its discriminatory effect targeting skycaps to his employer and state agencies, Anderson found himself isolated from other skycaps, restricted to permanently working only at the West end of the loading zone, where there was the least passenger traffic, and permanently prohibited from working at the East end of the loading zone, even when his ticket machine was broken. Then, un-

like other skycaps who were allowed to work on any available machine, Anderson was required to sit by his broken machine until it was repaired, or go home. Anderson filed his suit in state court, alleging age and race discrimination, and retaliation for exercising protected rights under the California Fair Employment and Housing Act (FEHA), and intentional infliction of emotional distress.

American Airlines (American) removed the case to federal court under diversity jurisdiction, where it filed a motion for summary judgement. In opposition, Anderson's late-filed Memorandum of Points and Authorities and Declaration (detailing the denial of the six hour work shift) was admitted into evidence by Court Order dated May 19, 2008.

On May 19, 2008, Anderson also filed a Supplemental Declaration that included (1) excerpts from Anderson's deposition that American had omitted, (2) questionnaire responses from skycaps, and (3) a letter from American to Anderson with an ultimatum to elect lay off or collect the $2 per bag fee for American, together with an Amended Memorandum of Points and Authorities, amended only to correct typing and grammatical errors. American requested an extension of time to respond to Anderson's papers.

On May 21, 2008, the Court issued a Order denying American's request for an extension of time to respond to Anderson's papers, in which it also ruled: "Any yet further untimely evidence submitted by plaintiff, however, will not be considered."

On June 6, 2008, the District Court ruled on American's motion for summary judgment without

oral argument. The District Court ruled that Anderson had met the requirements of the bona fide case of age and race discrimination with regard to the machine assignment, then ruled that American had a legitimate reason to assign Anderson to only one machine –to keep track of the work and productivity of employees. The Court did not address the denial of the six hour shift and the denial of the request to work at the East end after the $2 per bag was instituted, or the retaliation claim.

On appeal, the Ninth Circuit in its Opinion found that Anderson had provided no evidence to refute American's nondiscriminatory explanation for its differential treatment of Anderson –namely that he needed to be at a specific terminal for tracking purposes. The Ninth Circuit found there was no evidence of adverse effect to support the retaliation claim. It did not address the denial of the available six hour shift or the request for assignment to the East end that was made after the $2 bag fee was instituted.

In his Petition for Rehearing, Anderson identified specific evidence (not discussed in the Ninth Circuit's Memorandum Decision) regarding denial of the request for a six hour shift; denial of the request for assignment to the East end of the passenger loading zone; the permanent restrictions and prohibitions regarding work location, isolation and ostracism; and evidence of pretext, i.e. that Anderson's ticket machine was portable, and tracking could be done on any ticket machine. See Petition for Rehearing in Appendix. The petition for rehiring was denied without comment.

Anderson files this Petition to seek this Court's review of the requirements of discrimination and

pretext regarding age and race discrimination in employment under the controlling substantive provisions of the California Fair Employment and Housing Act (FEHA), declaring that freedom from age or race discrimination in employment is a civil right, and that the purpose of FEHA is to "protect and safeguard" that right, and to eliminate such discrimination with respect to summary judgment motions.

This Petition seeks review of retroactive application of Orders that effectively precluded evidence of discrimination and pretext in violation of FEHA and other employment discrimination laws. It seeks review of the exclusion of questionnaire answers that Anderson's fellow skycaps signed in the affirmative, "My answers are true."

REASONS FOR GRANTING PETITION

1. The petition should be granted because the Lower Court decision was in conflict with controlling State Law regarding The employment discrimination and civil rights of Anderson under FEHA.

California age and race employment discrimination law under the California Fair Employment and Housing Act (FEHA) California Government Code Section 12900 et seq. is similar to Federal Law, and California State Courts often look to federal law for guidance, but FEHA differs from federal discrimination law in four significant ways: First, California Government Code Section 12920 declares that the "public policy" of the State of California is to "protect and safeguard" the right and opportunity of all persons to seek, obtain, and hold employment" without age or race discrimination; Second, Government Code Section 12920 expressly recognizes that discrimination in the terms of employment on the basis of age or race "foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advancement, and substantially and adversely affects the interest of employees, employers, and the public;" Third, the express purpose of FEHA is to "provide effective remedies that will eliminate these discriminatory practices;" Fourth, Government Code Section 12921(a) states the opportunity to hold employment without discrimination because of age or sex is a "civil right."

Petitioner asks this Court to grant this petition because the Lower Court did not apply FEHA provisions consistent with the express purpose of

FEHA to the summary judgment before it. Instead, the Lower Court either ignored FEHA or applied FEHA mechanistically in a manner that was hostile to its express intent.

In Romano v. Rockwell International, Inc (1996) 14 Cal. 4th 479, 59 Cal. Rptr. 2d 20, 926 P. 2d 1114, the California Supreme Court relied on the statutory language of FEHA and its stated purpose to adopt a California rule regarding the date that an employment discrimination action accrued under FEHA for purposes of FEHA statute of limitations that was different from the date that employment discrimination accrued under federal employment discrimination law. In so doing, the California Supreme Court observed that although it often looked to Federal discrimination law for guidance, when appropriate, for this purpose, the statutory provisions of FEHA should be interpreted according to their usual and ordinary import, keeping in mind the apparent purpose of the statute (id. at 1 Cal. 4th 493) and that "the remedial purpose of the FEHA [was to] safeguard the employee's right to seek, obtain, and hold employment without experiencing discrimination" (id at 14 Cal. 4th 494).

In Romano, the California Supreme Court ruled,"In order to carry out the purpose of the FEHA to safeguard the employee's right to hold employment without experiencing discrimination, the limitations period set in the FEHA should be interpreted so as to promote the resolution of potentially meritorious claims on the merits." (id. At 14 Cal 4th 494).

The California Supreme Court also looked to the express purpose of FEHA in Richards v. CH2M

Hills, Inc. (2001) 26 Cal. 4th 798, 111 Cal. Rptr. 2d 87, 29 P. 3d 197, where it adopted a California doctrine of continuing violation under FEHA that was at odds with the federal rule. Therefore, this petition should be granted because the decision of the Lower Court was in conflict with the provisions and purpose of FEHA as interpreted by the California Supreme Court in Romano and Richards.

The Lower Court purported to rely on FEHA analysis regarding employment discrimination and pretext in the summary judgment motion that was before the California Supreme Court in Guz v. Bechtel National, Inc (2000) 24 Cal. 4th 317, 100 Cal. Rptr. 2d 352, 8 P. 3d 1089. However, in Guz, the Court addressed allegations of age discrimination amidst downsizing regarding the elimination of jobs, and there was no reference to the purpose of FEHA, that was central to the California State Supreme Court's subsequent Opinions in Romano and Richards.

Furthermore, at the time of the Guz decision, in his concurring opinion, Justice Chin noted, "This court has not yet considered the effect of the [summary judgment] amendments in a discrimination case." (id at 24 Cal. 4th 373). Justice Chin's observation was made with reference to fact that in 1992 and 1993, California amended its summary judgment laws to move closer to federal laws, and it was not before the Court in deciding the Guz case.

Petitioner asks this Court to grant review of this petition because that time has come. The effect of summary judgment on discrimination cases is now before this Court because of the conflict between the Lower Court and the Romano and

Richards case regarding the manner in which the Lower Court failed to apply FEHA to the present case in terms of its express statutory language and purpose. Furthermore, this is a case involving the terms and conditions of continuing employment.

2. The Petition should be granted because review of summary judgment proceeding and rules with regard to employment discrimination, generally, and FEHA in particular is of compelling paramount importance and ripe.

This petition should be granted because the effect of the summary judgment procedures under California law, essentially the same as under federal law, with minor differences, is before the court on removal due to diversity jurisdiction. The importance of reviewing summary judgment proceedings in employment discrimination cases in general and particular with respect to FEHA is evident from the divergence of the Local Court's ruling from FEHA and the purposes for which FEHA was enacted.

The California Supreme Court in Aguilar v. Atlantic Richfield Co. (2001) 25 Cal. 4th 826, 107 Cal. Rptr. 2d 841, 24 P. 3d 493 has compared the summary judgment proceedings under current California with summary judgement proceedings under federal law. However, in Aguilar, the comparison was done in the context of an antitrust action for civil conspiracy, not employment discrimination.

The compelling importance of reviewing the application of summary judgment proceedings with regard to federal and state employment discrimination laws generally, and FEHA in particular was

recently reflected by a review of summary judgment proceedings in employment cases by a California Court of Appeal in Nazir v. United Airlines, Inc (2009) 178 Cal. App. 4th 243, 286. There, the Court reviewed both the salutary affects of the California amendments (moving closer to federal statutes), and also criticism of the amendments, with particular reference to its effect on employment cases. Their review included a review of the following Law Review Articles Wald, *Summary Judgment at sixty* (1998) 76 Texas L. Rev. 1897 (Wald); Miller, *The pretrial Rush to Judgment* (2003) 78 NYU L.Rev. 982), and Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases* (1999) 34 Wake Forest L.Rev. 71). The Nazir court concluded:

> "We take no position on the criticism, but do observe that many employment cases present issues of intent, and motive, and hostile working environment issues, not determinable on paper. Such cases we caution, are rarely appropriate for disposition on summary judgment, however liberalized it be."
>
> (Nazir at 178 Cal. App. 4th 286)

Petitioner contends this case is just such a case, and that the granting of this petition to review summary judgment in employment discrimination cases, generally, and specifically with respect to FEHA is of paramount, compelling importance.

In her concurring and dissenting opinion in the Guz case, Justice Kennard, with specific reference to Justice Ginsburg's concurring opinion in Reeves v. Sanderson Plumbing Products, Inc (2000)

530 U.S. 133, suggested where the focus should be on whether the evidence of employment discrimination raised a triable issue of material fact to be resolved at trial as follows:

> "Under California law, a moving party is entitled to summary judgment only when "no triable issue of material fact" exists for trial (Code Civ. Proc., Section 437c, subd. (o)(1) and (2). In reviewing an order granting or denying summary judgment, "we examine the facts present to the trial court and determine their effect as a matter of law.
>
> . . .
>
> As Justice Ginsburg's concurrence in Reeves explained, 'two categories of evidence are needed to support a jury's verdict in a disparate treatment case based on the circumstantial evidence of unlawful discrimination. '[F]irst, evidence establishing a 'prima facie case.'... and second, evidence from which a rational fact finder could conclude that the employer's proffered explanation for its action was false."
>
> . . .
>
> Here, however, we are concerned not with the sufficiency of evidence to sustain a jury verdict of age discrimination, but only whether Guz's evidence raises "a triable issue of material fact" to be resolved at trial"
>
> (id. at 24 Cal. 4th 378, 384)

The paramount importance presented for review of summary judgment proceedings with regard to employment discrimination law generally,

and specifically with reference to FEHA, at issue, was expressed by the Nazir Court, quoting from the Law Review Article by Chief Judge Wald as follows: "Its flame lit by *Matsushita, Anderson, and Celotex* summary judgment has spread ...through the underbrush of undesirable cases, taking down some healthy trees as it goes." This we cannot allow." (id at 178 Cal. App. 4th 243, 286.

Petitioner submits this case is one of the "healthy trees," and that granting the petition in this case is important to review the conflicting application of summary judgment to employment discriminations cases, generally, and specifically with regard to the FEHA, which the Lower Court did not do.

Parenthetically, the importance of such a review is also evident from the record of this case that documents Anderson's willingness to sit for deposition and delay conducting the usual discovery in favor of a prolonged Early Neutral Evaluation and Mediation process. Then when his employer abandoned the Early Neutral Evaluation - Mediation process, Anderson found himself confronted by a preemptive summary judgment motion from an employer who refused to respond to the discovery that Anderson propounded during the Early Neutral Evaluation process on the grounds it was now untimely; and a Local Court that applied an Order retroactively to exclude additional evidence of discrimination, pretext, and retaliation.

When a summary judgment motion in an employment case is filed in this pre-emptive manner to force a judicial decision without the benefit of all the material facts, it is not aimed at the "underbrush of

undesirable cases," but is intended to "take down healthy trees." Therefore, petitioner asks this court to grant this petition to review summary judgment proceedings in relation to employment discrimination cases, generally, and specifically in relation to FEHA, and the purpose for which FEHA was enacted.

3. This Petition should be granted because in granting Summary Judgment on the Issue of Retaliation, the Lower Court's Decision was in conflict with State Law under FEHA.

In Yanowitz v. L'Oreal USA, Inc. (2005) 36 Cal. 4th 1028, 32 Cal. 4th 1028, 32 Cal. Rptr. 3d 436, 116 P. 3d 1123, the California Supreme Court discussed the extent to which employees are protected by FEHA from retaliation with regard to complaints that arise to the level of a protected activity because they are made in good faith and to the adverse consequences they experienced. The scope of a retaliation cause of action for engaging in protected activities under the comparable provisions of federal employment discrimination law was also recently before this Court in Gomez-Perez v. Potter (2008) 128 S.Ct. 1931 in an Opinion authored by Justice Alito.

Petitioner submits the Lower Court Decision is in conflict with both the Yanowitz and Gomez-Perez cases, and specifically in its summary conclusion of no adverse effect, despite the testimony of Anderson in his depositions regarding his treatment after he complained about the $2 bag charge, and its discriminatory targeting of sky caps. That documentation was in the record before the District

court, the Ninth Circuit, and was specified in the Petition for Rehearing with reference to evidence in the record (See Appendix).

In failing to apply summary judgment rules to Anderson's specific testimony regarding the retaliation claim, adverse treatment, and the inference there from in light of the language and express purpose of FEHA, the Lower Court Decision on retaliation was in conflict with FEHA and comparable provisions of Federal discrimination. This petition should be granted to review the retaliation claim (and related claim for intentional infliction of emotion distress) under discrimination law generally, and specifically under the FEHA.

4. This Petition should be granted because evidence of discrimination, pretext, and retaliation was excluded by the retroactive application of Court Order, contrary to FEHA

The excluded evidence consisted of a Supplemental Declaration from Anderson's counsel, including exhibits that consisted of (1) Excerpts from the Deposition of Anderson, that were omitted by the moving party, American; (2) Questionnaires answers from fellow skycaps regarding the unfair treatment of Anderson, signed in the affirmative, "My answers are true;" and (3) A letter from American to Anderson, with the ultimatum to either "elect lay off" or collect the $2 bag fee for American (See Appendix).

This Supplemental Declaration and attached Exhibits was filed May 19, 2008, the same day the Court issued its Order that accepted Petitioner's late-filed opposition. On May 21, 2008, the Court

issued a subsequent Order denying American's request to extend time to file its reply brief, in which the Court ordered, "Any yet further untimely evidence submitted by plaintiff, however, will not be considered." (Appendix)

Subsequently, the May 21, 2008 Order was given retroactive effect to exclude the Supplemental Declaration and Exhibits so that this evidence of discrimination and pretext was not considered. While State and Federal Laws that govern summary judgment contain provisions that allow for providing additional Declarations so that all material facts are before the court, the retroactive application of the Lower Court's Summary Judgment Order excluded material evidence. This conflicted with the purpose of discrimination laws, generally, and with the express purpose of FEHA to "protect and safeguard" the right of employees to be free from discrimination in employment.

In Sprint/United Management Co. v. Mendelsohn (2008) 520 U.S. ____, 128 S. Ct. 1140, this court took up the question of the admissibility of evidence from former employees in an age discrimination case. The Court framed the issue on appeal as follows: "Whether, in an employment discrimination action, the Federal Rules of Evidence require admission of testimony by nonparties alleging discrimination at the hands of persons who played no role in the adverse employment decision challenged by the plaintiff," (id at 128 S.Ct 1144). This court's answer was that the relevance of the evidence is "fact based and depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case, and that similar considerations are involved in balancing the

probative value of the evidence against its prejudicial effect." (id at 128 S.Ct.

Here, the retroactively excluded questionnaire answers were signed, "My answers are true," and came from employees who testified to the unfair treatment of Anderson they witnessed. Petitioner contends the exclusion of this evidence was contradictory to summary judgment generally, and to the provisions of state and federal summary judgment laws that confer on judges the ability to obtain evidence of material facts, and specifically to employment discrimination cases generally and FEHA in particular. Accordingly, this petition should be granted to review the retroactive exclusion of evidence, including the questionnaire answers from fellow skycaps.

CONCLUSION

For all the above reasons, the Court is requested to grant this petition to review summary judgment proceeding on removal as applied to employment discrimination, generally, and especially under FEHA, and its stated purposes.

Respectfully submitted,
/s/Frederick C. Roesti/s/
Frederick C. Roesti, attorney for Edward Anderson, admitted to practice before the United States Supreme Court, 1982

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-o-

FILED
Oct 14 2009

NOT FOR PUBLICATION

United States Court of Appeals

For the Ninth Circuit

Edward E. Anderson,

Plaintiff - Appellant,

v.

AMR, The Parent of American Airlines Inc.;, et al.

Defendants - Appellees.

No. 08-16586

D.C. No. 3:07-cv-03527-WHA

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
William H. Alsup, District Judge, Presiding

Submitted October 9, 2009**
San Francisco, California

Before: RYMER and TASHIMA, and RESTANI,*** Judge.

*This disposition is not appropriate for publication except as provided by 9th Cir. R. 36-2

**The panel unanimously finds this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

***The Honorable Jane A. Restani, Chief Judge of the United States Court of International Trade, sitting by designation.

Edward Anderson appeals the district court's order granting summary judgment in favor of AMR, the parent company of American Airlines, on his claims of age and race discrimination, retaliation, and negligent/intentional infliction of emotional distress under California law. We have jurisdiction, 28 U.S.C. sections 1291 & 1332, and we affirm.

I

The district court did not abuse its discretion in refusing to consider Anderson's second untimely filed opposition to summary judgment. *See Adams v. Cal. Dept. Of Health Servs.*, 487 F. 3d 684, 688 (9th Cir. 2007)("District courts retain broad discretion to control their dockets. . . ."); N.D. Cal. Local R. 7-3(a). Anderson provided no justification for why the opposition was filed late. Given that the district court *did accept* Anderson's first late filed opposition, it was well within its discretion to reject the second, so-called "amended" version.

II

The district court did not error in granting summary judgment in favor of AMR on Anderson's age and discrimination claims. Anderson provided no evidence to refute AMR's non-discriminatory claims. Anderson provided no evidence to refute AMR's non-discrimination explanation for its differential [-2-] treatment of Anderson - namely, that he was the only non-contract sky cap working at the airport and that he needed to work at a specific terminal for tracking purposes. *See Guz v Bechtel Nat'l Inc.*, 9. P. 3d 1089, 1114 (Cal. 2000). When Anderson first began working at the west end of the curbside check-in area other skycaps who were older and were also African American were stationed at the more desirable east end. Moreover, Anderson testified in his deposition that no supervisor had ever given any condition of his

employment was affected by his age or race. Because Anderson failed to refute AMR's non-discriminatory explanation for of him, summary judgement was appropriate. *See id* ("If the employer sustains this burden [of offering a legitimate, non-discriminatory explanation for its treatment] the presumption of discrimination disappears"].

III

Anderson's retaliation claim also fails. Assuming he did engage in protected activity he did engage in protected activity, Anderson was still required to show an adverse employment action. *Filat v. N. Am. Watch Corp., 4 Cal. Rptr. 2d 522, 528*)(Cal. Ct. App. 1992). Anderson was working shift at the same location on the curb well before he complained of the new $2 checked bag fee in 2005, There is also nothing in the [-3-] record tending to show Anderson's complaints about his computer terminal first arose after implementation of the checked bag fee. In short, the conditions of Anderson's employment remained the same after he complained about the new checked bag fee, and thus summary judgment was appropriate because no adverse employment action was shown.

IV

The district court did not err in granting summary judgment on Anderson's negligent infliction of emotional distress (NIED) claim because the actions he complains of were intentional, not negligent. California law does not allow an NIED claim to proceed in such circumstances. *See Semore v. Pool,* 266 Cal. Rptr. 280, 291 (Cal. Ct. App. 1990) ("[A]y actions by the employer were intentional not negligent. An employer's supervisory conduct is inherently intentional." (internal quotation marks omitted). "The conduct alleged here does not support

a cause of action for negligent infliction of emotional distress." *Id.*

V

Finally, there was no error in granting summary judgement in favor of AMR or Anderson' intentional infliction of emotional distress (IIED) claim. An IIED [-4-]plaintiff must show, among other things (e)xtreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing emotional distress...." *KOVRTV, Inc. V Superior Courts*, 37 Cal Rpt 2d 431 Ct App (1995)(Internal quotation marks and citation omitted). "Generally, conduct will be found to be actionable where the recitation of the facts to an average member of the community would arouse his resentment against the actor and lead him to exclaim 'Outrageous!' *Id.* (Internal quotation mark and citation omitted). Anderson has made no showing that AMR's conduct was so egregious here.

AFFIRMED [-5-]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT

OF CALIFORNIA

EDWARD ANDERSON,

Plaintiff, NO. C 07-03527 WHA

v.

AMR THE PARENT OF AMERICAN AIRLINES, INC., and DOES 1 through 5, inclusive.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendants,

INTRODUCTION

In this employment-discrimination action, defendant American Airlines, Inc., moves for summary judgment as to all asserted claims. This order finds that plaintiff has failed to show the existence of a triable issue of material fact with respect to any of the claims in suit. Accordingly, defendant's motion is GRANTED.

STATEMENT

Plaintiff Edward Anderson, a 73-year old African American, is employed as a "skycap" for defendant American Airlines, Inc., at the San Francisco International Airport. When an AA passenger arrives at the airport, they have the choice of checking in at the AA desk located inside the airport or "curbside," –*i.e.*, directly adjacent to where

passengers are dropped off. Anderson's primary job was to check in those passengers who chose the latter method to check in. Prior to beginning his employment with AA, Anderson was employed as a skycap for Trans World Airlines. In December, 2001, however, TWA filed for bankruptcy and AA acquired its assets. At that time, Anderson, along with TWA's other skycaps, were offered and accepted employment with AA. All of the other TWA skycaps who began working for AA have since retired. Anderson is the only remaining skycap employed by AA. Before December 2001, AA had no skycap employees, but instead used an outside contractor –Globe (now known as G-2) –to hire employees to perform skycap duties. AA still uses Globe for its skycap program.

Anderson contends that when he began working for AA in December 2001 that he requested to have a six- hour shift (Anderson Decl. Section 4 Instead, Anderson was given a shift from 8:00 AM to Noon. Anderson now maintains that he learned soon thereafter that some G-2 skycaps were regularly given six-hour shifts (*-id-*) At his deposition, Anderson admitted that he never made any other request to change shifts (Anderson Dep. 143-144):

> Q). [After] it was established that you would start at 8:00, did you ask anyone else to start at 6:30?
>
> A). No, is that what you were saying, 6.30.
>
> Q). Or any other earlier time?
>
> A). No.

Anderson testified that his curbside location – the west end of the airport – was also determined in December 2001.

In August 2005, AA instituted a new baggage

policy: all customers who checked in bags curbside would have to pay a two–dollar fee per bag. Before the policy was implemented, curbside check in was provided at no additional cost. Skycaps before and after the implementation of the policy were always permitted to solicit and receive tips. Anderson contends that this policy had a significant impact on his salary because customers were now less inclined to give skycaps tips due to the additional fee. Anderson also maintains that he was the principal skycap to protest the implementation of the new policy to AA. The additional fee applied to both the AA and G-2 skycaps. At the time the policy was implemented, AA skycaps were given the optin of continuing employment with the two-dollar fee policy or ele :ting to terminate employment and receive severance pay (Olson Decl. Section 5). Anderson chose to continue employment. [-2-]

Anderson now maintains that throughout his entire employment with AA he was treated unfairly and given an undesirable curbside location. In particular, Anderson argues that he was assigned by himself to the le ast desirable location for curbside check in - west end of the airport – and prohibited from working at any other stations (Anderson Dep. 135:14-23). Notably, vehicle traffic in the departure terminal moves from east to west. Passengers are thus likely to get dropped off at the east end. Anderson further argues that he was forced to operate only one curbside check-in machine while the skycaps ere allowed to use multiple machines *(ibid)*. When this machine broke down, Anderson contends that he would be unable to check in any curbside passengers. AA agrees that American skycaps were required to use their own machine at the San Francisco Airport he baggage tags they processed each shift could be accounted for" (Olson Decl. Section 4).

Anderson filed an administrative charge of discrimination with the California Department of Fair Employment and Housing on January 24, 2006, and was issued a right to sue letter on January 25, 2006. The instant complaint was filed on January 9, 2007, alleging AA discriminated against Anderson based on his race and age. The complaint recites four claims: (1)injunctive relief under FEHA, (2) damages under FEHA, (3) negligent infliction of emotional distress, and (4) intentional infliction of emotional distress: Defendant now moves for summary judgment as to all claims. In opposing defendant's motion, plaintiff untimely filed two separate oppositions. The Court has since allowed the first opposition to be considered (Dkt. 43). Plaintiff has given no justification, however, for its untimely filing of the second opposition. In addition, a large portion of the material added to the second opposition filing is hearsay and unsworn factual allegations. The second opposition filing will thus not be considered.(fn 1) [-3-]

ANALYSIS

Summary judgment is granted when the "pleadings, depositions, answers to interrogatories, on file in admission together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FRCP 56(c). A district court must determine, viewing the evidence

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(Fn 1) Plaintiff included as an attachment to the second opposition filing several questionnaires given to other sky caps where they purport to give their opinions on whether plaintiff has been treated unfairly. These questionnaires are entirely unauthenticated and unsworn.

in the light must favorable to the nonmoving party, whether there is any genuine issue of material fact. *Giles v. General Motors Acceptance Corp.*, 494 F. 3d 865, 873 (9th Cir. 2007). A genuine issue of fact is one that could reasonably be resolved, based on the factual record, in favor of either party. A dispute is "material" only if it could affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 248-249 (1986)(fn 2)

The moving party "has both the initial burden of production and the ultimate burden of persuasion on a motion for summary judgment." *Nissan Fire &Ins. Marine, Ins. Co. td. v. Fritz Cos. Inc.*, 210 F., 3d 1099, 1102 (9th Cir. 2000). When the moving party meets its initial burden, the burden then shifts to the party opposing judgment to "go beyond the pleadings and by [its] own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designates specific facts showing that there is a genuine issue for trial." *Celotex Corp. v Catrett* 477 U.S. 317, 324 (1986).

I. ARE ANY OF THE ALLEGED DISCRIMINATORY ACTS TIME BARRED?

Defendant first contends the majority, if at all, of the alleged discriminatory acts occurred outside the limitations period. It is not exactly clear from Anderson's complaint and briefing what actions are alleged to have been discriminatory. This order will

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(Fn 2) Unless indicated otherwise, internal citations and quotations are omitted in all cites.

assume Anderson alleges the following acts were discriminatory: (1) his shift and locations assignments; (2) the implementation of the two-dollar per bag fee; (3) the unfair treatment he received when his machine broke down; and (4) his inability to use multiple machines for check-in purposes.

The statute of limitations period begins to accrue on an act of discrimination when that [-4-] act "occurred" As the Supreme Court held in *National R.R. Passenger Corp.v. Morgan,* 536 U.S. 101, 110-113 (2002):

> A discrete retaliatory or discriminatory act "occurred" on the day that it "happened"....(Discrete) discriminatory acts are not actionable if time barred, even when they are related to acts in timely filed charges, acts state a new clock for filing charges each discrete Each discrete discriminatory act starts a new a new clock for filing charges alleging that ace . . The existence of past and the employee's prior knowledge of their recurrence, however, does not bar employee's prior knowledge of their occurrence; however, does not bar employees from filing charges about related discrete acts so long as the acts are independent discriminatory and charge addressing those acts are themselves timely filed. Nor does the ------- bar an employee from using the prior acts as background in support of a timely claim.

"A new violation does not occur; and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from past the discrimination. But if an employer engages in a series of *separatey* actionable intentionally discriminatory acts, then a fresh violation takes place

when each act is committed." *Ledbetter v. Goodyear Inc. Tire & Rubber Co.*127 S Ct" 2162, 2164 (2007)

Therefore, while Anderson can use prior acts of alleged discrimination as background evidence to support a timely claim, he cannot recover for these prior acts if they fell outside the statute of limitations. Under FEHA, "no complaint may be filed after he expiration of one year from the date upon which the alleged unlawful practice or refusal to cooperate occurred." Cal. Gov. Code _____12960 *See also Cuecuza a City of Santa Clara*, 104 App 1031`40 (2002). Plaintiff filed a charge with the DFEH on January 24, 2406. He cannot recover under FEHA for any event that took place before January 2005 (a year before the filing with DFEH" The statute of limitations period for negligent emotional distress – Anderson's third and fourth claims, – respectively – is two years. Cal. Code Civ. Pro -----335.1.) Anderson is thus barred from seeking damages from any act occurring before January 2004 with respect to his negligent and intentional infliction of emotional distress claims.

Anderson contends that the statue of limitation does not bar any of his claims. This blanket assertion is incorrect. At the deposition, Anderson admitted that his shift and location assignments were given to him when he first began employment with AA in December 2001) [-5-]

He also admitted that he never requested to be reassigned to a different shift time or location (Anderson Dep.143-144). While his previous shift and location assignment can be considered as background evidence of a timely claim, they cannot serve as discrete acts of discrimination upon which Anderson can recover for any of his claims. The alleged discriminatory acts -- the assignments themselves – were made well outside of the

limitations period.

In terms of the remaining acts of discriminatory conduct, a specific date of occurrence is only given for the implementation of the two-dollar bag policy- That date–August 2005 – *does* fall within the limitation period for all of Anderson's claims. Because it is unclear when the other allegedly will assume that they all took place during the limitation period.

2. CAN ANDERSON ESTABLISH RACE OR AGE DISCRIMINATION?

"California has adopted the three-stage burden shifting test established by the United States Supreme Court for trying claims of discrimination . . . based on a theory of desperate treatment." Hammond's County of Los Angeles, *Hammond's County of Los Angeles* 160 .4th.1579,1592(2008). "In order to evaluate claims of intentional discrimination when intent is generally impossible to prove, courts apply a burden-shifting analysis (developed in *McDonnell Douglas Corp & Green* 411 U.S. 792, 802-03 (1973). The analysis consists of three steps. *First,* the *McDonnell* test places on the plaintiff the initial burden to establish a prime facie case of discrimination. This step is designed to eliminate at the outset the most patently meritless claims, as where the plaintiff is not a member of the protected class or was clearly unqualified, or where the job he sought was withdrawn and never filled. While the Plaintiff's prime facie burden is 'not onerous, he must at least show actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on a [prohibited] discriminatory criteron. "*Guz,*24 Cal, 4h at 354-55 *a* legitimate a pri*m*a facie case, a presumption of discrimination arises. This presumption, though 'rebutable,' is

legally mandatory:.. . Accordingly, at this trial stage, the burden shifts to the employer to rebut the presumption by producing admissible evidence, sufficient to 'raise[]a genuine issue of fact' and to justify a judgment to the [employer],' that [-6-] its action was taken for a legitimate, nondiscriminatory reason." *Guz, 24 Calth at 355-56. Third*, [I] the employer sustains this burden, the presumption of discrimination disappears. The plaintiff must then have the opportunity to attack the employer's proffered reasons as pretexts for discrimination, or to offer any other evidence of discriminatory motive. In an appropriate case, evidence of dishonest reasons, considered together with the elements of the prima facie case, may permit a finding of prohibited bias. The ultimate burden of persuasion on the issue of actual discrimination remains with the plaintiff." *Guz,4 Cal. 4th 356. See also McDonnell's Douglas Corp. V Green, 411 []* U.S. 92(1973).

A. Did Anderson Establish a Prime Case of Discrimination?

Anderson has met the initial burden of establishing a prime facie case for some of his allegations of discriminatory conduct In particular, Anderson has established a prime facie case base based on the unfair treatment he received when his check-in machine broke down. The *McDougal Douglas* test requires a plaintiff to provide evidence that: 1)he was a member of a protected class; (ii) he was qualified for the position he sought or was performing competently in the position he held; (iii) he suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (iv) some other circumstance suggests

discriminatory motive *Guz*,24 Cal. 4th at 355. (fn 3)

Here, it is undisputed that plaintiff is a member of a protected class. No evidence has been presented one way or the other to demonstrate that Anderson was performing his job competently. This order will assume *arguendo* that he was. Anderson has also provided enough evidence to show the final two requirements of a prima facie case have been satisfied with respect to his allegations that he was discriminated against by being precluded from working on other check-in machines when his broke down.

The implementation of the two-dollar bag policy by itself, however, is not enough to show any discrimination. The policy was implemented uniformly for *all* skycaps. While Anderson may very well be correct that his salary was negatively impacted as a result of [-7-] the policy implementation, he simply does not show any discriminatory conduct. He also does not show any discriminatory action that was taken that was taken subsequent to the alleged protest over the implementation of the policy. Nothing on the record indicates he was treated any differently before or after the policy was implemented. The only evidence Anderson indirectly points to was given to all employment or elect severance pay. Once again though, this option was given whether or not he wished to continue employment.

Anderson's inability to work at a different check-in machine, however, does establish a prima

---

(fn 3) In terms of age discrimination, Anderson need only show that he is of forty years of age or older to be a member of a class. *See Hersant v. Dept. of Social Services,* 57 Cal. App. 4th 997, 1003 (1997).

case of discrimination. Anderson testified that he was the only skycap that was required to use a specific check-in machine at the airport. When this machine broke-down, Anderson was unable to work and had to wait for the machine to get fixed thereby depriving him of tips in the 102:7-12(Dep.027-12). A jury could reasonably find under these circumstances that Anderson was discriminated against as a result of his age or race.

B. Was a Legitimate, Nondiscriminatory Reason Provided?

Given the plaintiff has made a prime facie showing, the burden shifts to AA to show that its action was taken for "a legitimate nondiscriminatory reason." *Guz*,4 Cal 4th-at Section 355,56. AA's purported legitimate reason assigning Anderson for a specific check-in machine reason for assigning Anderson to a specific check-in machine was so that edit could track the work (including the baggage check-in (a) and the productivity of its employee (Olson Decl 54). For obvious reasons, ensuring that all bags that are processed for and tracked as desirable goal in air travel. This order therefore, finds that AA has provided a legitimate, nondiscriminatory reason for its action.

C. Did Anderson Show "Pretext?"

Anderson must now come forward with evidence indicating that AA's proffered reason is merely pretextual. *Noyes v. Kelly Service, 488 F 3d 1163, 1170* The Ninth Circuit held (emphasis in original):

> [A] plaintiff can prove pretext in two ways: (1) *indirec*tly, showing that the employer's proffered explanation is 'unworthy of credence'

> because it is internally inconsistent or otherwise not believable, or (2) *directly*, by showing that unlawful discrimination more likely motivated the employer. All of the evidence is to pretext]–whether direct or indirect–is to be considered [-8-] cumulatively. Where the evidence of pretext is circumstantial other that direct, the plaintiff must present 'specific' and 'substantial' facts showing that there is a genuine issue for trial. However, that requirement is tempered by on observation that, in the context of Title VI claims, the burden on plaintiffs to raise a triable issue of fact as to pretext is 'hardly an onerous one."

Anderson has failed to make any showing of pretext. Anderson has not even attempted to address AA's proffered explanation for not allowing Anderson to work on multiple check-in machines. In this regard , no direct evidence of pretext has been shown.

In addition, Anderson's direct evidence is scant and inadequate. *First,* when asked at deposition what led him to believe A's decision to implement the two-dollar per bag policy was based on race, Anderson stated the following (Anderson Dep. (147-9-148"1):

> Q. What facts are you aware of that make you believe that it was done to impact you as a minority?"
>
> A. Well, they did not do the bartenders out there in American Airlines' room. They did not cut their tips. There is no charge–
>
> Q. Are you aware of any other facts that suggest to you that you were treated differently in your at American Airlines

because of your race?

A Yes, that. That's one reason.

Q. But my question was, are you aware of any other fact that suggest that the other was taken by American because of your race.?

A. Yes, that. That's one reason.

Q. But my question was, are you aware of any other fact that suggests that the action was taken by American because of your race?

A. Age.

Q. I'm only talking about race.

A. No, I can't say.

Q. I'm only talking about race.

A. No. I can't say.

The only "fact" that Anderson cites to is that the bartenders inside the airport wee not asked to implement any policy that affected their tips, but Anderson gives no explanation of why the bartenders should be compared to skycap to begin with. He also does not refute – as discussed above – that the policy implementation (*i.e*,) the only thing he could point to at his deposition was unfairly applied to *all* skycaps. *Second,* in terms of age discrimination, Anderson admitted that the majority of skycaps who work at the San Francisco airport was over the age of forty (*id.* at 47-1-4)

Q. Do you know if [the skycaps] are all over the age of 40?) [-9-]

A. Not all of them, no.

Q. Are most of them over 40?

A. Most of them.

Third, the record also shows, and Anderson acknowledges, that the G-2 skycaps used the same type of check in machines as Anderson, that all the machines broke down on occasion, and that the same people who were called to the G-2 check-in machines also fixed Anderson's (*id.* at 129:20-25,13:)1-5, and 114-4-.14). *Fourth*, at his deposition Anderson produced a little over 700 pages of documents relating to his employment with AA, including notation indicating when the check-in machine broke down over the course of his entire employment with AA (Adam Decl. Section 2). According to defendant's sworn declaration, Anderson's notations showed that his check-in machine broken down eighteen times out of approximately 640 total and possible work days *(ibid)*. This amounts to roughly 2.8% of the total workdays. This low number hardly rises to a level warranting any skepticism. Even during the time Anderson's machine was broken, he was paid at his normal hourly per (Anderson Dep. 121 :16-25)

In sum, Anderson has offered no evidence demonstrating that any action taken by AA wee racially or age motivated. The only fact that Anderson does cite to in all of his briefings is that the skycaps who came over from TWA (all were African American no longer work for AA. (Anderson Decl 8) These skycaps , however, were all older than Anderson when they began working for AA and have since retired. Anderson was the youngest skycap among the entire group Other than that, Anderson only provides more speculation that he was discriminated against. Such speculation though,

does not create a triable issue of fact to preclude summary judgment. *See Horns Cushman & Waterfield Western, Inc.*, 72 Cal App 4th 798, 807 (1999) Anderson's discrimination claims brought under FEHA are thus Dismissed.

3. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

California courts have rejected negligent infliction, of emotional distress claims where the underlying conduct alleged was intentional. *See Semare v. Pool. 337* Cal. App. 14, 3d 197, 1105 (1990) Here at the conduct that Anderson relies on to infliction of negligent of emotional distress claim was intentional to support See *Cole v. Fair Oaks Fire Protection Dist* [-10-] 43 Cal. 3d 48,160(1987) ("An employer's supervisory conduct is inherently intentional") Anderson does not specifically address the issue in his opposition. Accordingly, his claim for negligent infliction of emotional distress is **DISMISSED.**

4. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

Anderson's last claim is for intentional infliction of emotional distress. The elements of an intentional interference of emotional distress claim are: (1) extreme and outrageous conduct by the defendant with the intention of causing or reckless disregard of the probability of causing emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and; (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. KOVR-TV, Inc. *v. Whittle*, 31 Cal. App.4th, 1023,102 (1995).

AA misconstrues the nature of Anderson's

burden with respect to this claim. According to AA, if Anderson's discrimination claim is dismissed then his intentional interference of emotional distress claim must also be dismissed (Br.14). This is not an accurate statement of the law. Anderson pled an independent claim for intentional infliction of emotional distress. Anderson must, therefore, independently demonstrate the existence of the above three elements. Anderson has failed to meet his burden. The standard for satisfying the first element is extraordinarily high, conduct to the outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community." *KOVR-TV,3)* Cal.App.4th at (1028 (1995) Anderson has not presented any evidence or argument that AA's conduct, discriminatory or not,.rose to this level of outrageousness. Anderson's claim for intentional infliction of emotional distress Is therefore DISMISSED.

CONCLUSION

For the above-stated reasons, defendant's motion is GRANTED with regard to all claims

Dated June 6, 2008

WILLIAM ALSUP
UNITED STATES
DISTRICT JUDGE

[-11-]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

EDWARD E. ANDERSON

Plaintiff,

v.

AMR THE PARENT OF AMERICAN AIRLINES, INC.

Defendant.

_____/

NO. C 07-03527 WHA

JUDGMENT

For the reasons stated in the accompanying order granting summary judgment, FINAL JUDGMENT IS HEREBY ENTERED in favor of defendants and against plaintiff. The Clerk SHALL CLOSE THE FILE

IT IS SO ORDERED.

Dated: June 6, 2008

William Alsup
William Alsup
United States
District Judge

FILED
November 12, 2009

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDWARD E. ANDERSON
Plaintiff-Appellant

v

AMR THE PARENT OF AMERICAN AIRLINES, INC.
Defendant-Appellees

/

No. 08-16586

D.C. No. 3:07-cv-v-03527-WHA
Northern District of California
San Francisco

ORDER

Before R. Rymer and Tasshima, Circuit Judges and Restani,* Judge

The panel has unanimously voted to deny the appellant's petition for rehearing.

The petition for rehearing is DENIED.

*The honorable Jane A. Restani, Chief Judge of the United States Court of International Trade, sitting by designation.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

EDWARD E. ANDERSON NO. C 07-03527 WHA
Plaintiff,

ORDERS RE
PENDING
MOTIONS

AMR THE PARENT OF
AMERICAN AIRLINES,
INC.
Defendant.
_____/

On April 24 defendants noticed a motion for summary judgment with a hearing date for May 29. The opposition was due on May 8. Plaintiff filed no opposition, but instead filed a motion for leave to amend the complaint on May 13, improperly setting a hearing date for May 29 (the same date as the hearing on defendant's motion for summary judgment. Defendant then filed their reply brief to the motion for summary judgment and an objection to plaintiff's improperly noticed motion for leave to amend the complaint. The Court was then informed by plaintiff's counsel that they were unaware their case had been designated for electronic filing. Plaintiff subsequently filed an opposition to the motion for summary judgment on May 15, and a motion to be removed from electronic filing on May 16.

The court sees no justification for counsel's bizarre behavior, but will allow the opposition to be submitted. Defendants have until MAY 23 AT NOON to file their reply in light of the opposition. The hearing of defendant's motion for summary judgment will be moved to JUNE 5 AT 8 AM. Plaintiff's improperly noticed motion for leave to amend the complaint will not be considered and will be taken off calendar. It should not be re-filed until after defendant's motion for summary judgment is ruled on. The Court reserves the question of whether plaintiff will be required to reimburse defendant for any incremental costs injected by

counsel's snafus. Plaintiff's motion to be removed from electronic filing is DENIED, but defendants must mutually serve plaintiff all documents file with the court until May 30.

Dated: May 19, 2008

William Alsup
Willilam Alsup
United States District
Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

EDWARD E. ANDERSON NO. C 07-03527 WHA
Plaintiff,

AMR THE PARENT OF AMERICAN AIRLINES, INC.
Defendant.
/

ORDERS RE PLAINTIFF'S CORRECTED OPPOSITION

The Court has been informed that defense counsel called the Court's deputy clerk to request an extension of time to file their reply brief in light of planitiff's improper filing of a corrected opposition. Defendant's request is DENIED. Defendant's reply brief remains due as scheduled on MAY 23 AT NOON. Any yet further untimely evidence submitted by the plaintiff, however, will not be considered.

Dated: May 21, 2008

William Alsup
WILLIAM ALSUP
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

EDWARD E. ANDERSON NO. C 07-03527 WHA

Plaintiff,

v.

AMR THE PARENT OF AMERICAN AIRLINES, INC.

Defendant.

/

CANCELLATION OF ORAL ARGUMENT

Due to the large press of other business, including back-to-back trials, the motions set for June 5, 2008, will be decided on the papers and without oral argument. If, however, any counsel send a letter by THURSDAY, JUNE 5, 2008 AT NOON, saying that a young lawyer (who has been for years or fewer out of law school) will argue the motion, the Court will find a different time to allow for oral argument and postpone ruling. Please do not aske for oral argument for associates with more experience than three years.

Dated: June 3, 2008 *William Alsup*

WILLIAM ALSUP
UNITED STATES
DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO-BRANCH

EDWARD E. ANDERSON	) Case No. 07-03527WHA
	)
Plaintiff,	) DECLARATION OF
	) FREDERICK C. ROESTI
v.	) IN OPPOSITION TO
	) DEFENDANT'S
AMR, The Parent of	) SUMMARY
AMERICAN AIRLINES	) JUDGMENT MOTION
and DOES 1 through 5,	)
inclusive,	) Date: May 29, 2008
	) Time: 8:30 a.m.
Defendants,	) Court: 9
	)
_____	) Hon. William Alsup

I, Frederick C. Roesti, declare:

1. I am the attorney for plaintiff Edward Anderson. I can provide competent testimony regarding the following if called to testify.

2. I request the court accept this declaration and exhibit for filing even though it is served and filed after the

memorandum of points and in opposition to defendant's summary judgment motion that was served and filed on Thursday, May 15, 2008 because it is limited to providing the documentary evidence the cited in the memorandum and this request does not prejudice defendant because the evidence was in defendant's hands since the date that it took plaintiff's deposition.

3. After I filed and served the memorandum and declaration of Edward E. Anderson on May 15, 2008, fourteen days before the May 29, 2008 hearing date. which I thought in good faith was filed in a timely manner based on the legal research of my law clerk regarding the filing dedlines,I received a telephone call from the court's clerk, informing me that the memorandum was in fact due 21 days before the hearing date. The clerk stated she would talk with the court to advise me how the court preferred I proceed. I am filing this declaration while I am waiting for the clerk to advise how the court would prefer I proceed.

4. Mr. Anderson filed this complaint to State Court. It was removed to Federal Court or the grounds of diversity, although it only pleaded state causes of action, because Defendant American Airlines, although operating out of the San Francisco International Airport, for purposes of diversity jurisdiction, claimed citizenship in a state other California.

5. I substituted in as plaintiff's attorney, and if the parties could reach a settlement in good faith after Defendant had an opportunity as this deposition of Plaintiff Anderson, we requested a Neutral Early Evaluation plaintiff commenced discovery. We were not able to do that.

6. I am submitting this Declaration to provide the Deposition Transcript Excerpts that are referenced in plaintiff's memorandum of points and authorities in opposition to this defendant's motion for summary judgment. I was present at the deposition of plaintiff Edward Anderson, and, and testify that the deposition transcript excerpts of the deposition transcript are true transcripts..

7. A true copy of the Transcript excerpts of the Deposition of Edward E. Anderson that are referred to in his memorandum of points and authorized in opposition to summary judgment are attached hereto as Exhibit 1.

8. The deposition transcript excerpts as Exhibit 1 include transcript pages 38-40,53-55, 67, 69, 74-76, 89-92, 98-102,102,131-136,142,181..

9. The memorandum of points and authorities in opposition to defendant's summary judgment motion and the deposition transcript refer to and describe statements provided to other sky caps who work for America Airlines at the San Francisco International Airport regarding the treatment of plaintiff. These statements document the manner in which plaintiff was isolated, and the manner in which plaintiff continues to be isolated, ostracized, by management, and treated in a discriminatory manner by Airline Airlines.

10. A true copy of those questionnaires and statements from other sky caps who work at American Airlines, either as employees of G-2, contracted to perform sky cap services at America Airlines is attached hereto as Exhibit 2.

11. The memorandum of points and authorities and deposition transcripts refer to a letter that American Airlines presented to Mr. Anderson for his signature in December, 2005 after defendant American Airlines' instituted its $2 per bag service fee in August, 2005. A true copy of this letter is attached hereto as Exhibit 3. I have read the above statement and declare under penalty of perjury under the laws of the State of California and the United States of America that it is true and accurate and that it was executed in San Francisco, California on Monday, March 19, 2008.

I have read the above statement and declare under penalty of perjury under the laws of the State of California

and the United States of America that it is true and accurate and that was executed in San Francisco, California on Monday, May 19, 2008.

Frederick C. Roesti
Frederick C Roesti

EXHIBIT NO. 1 TO ROESTI DECLARATION

EDWARD ANDERSON DEPOSITION EXCERPTS

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

EDWARD E. ANDERSON

Plaintiff,

No. 07-CV-3527 WHA

and, The Parent of AMERICAN AIRLINES, INC; AMERICAN AIRLINES, and DOES 1 through 5, Inclusive

Defendants

DEPOSITION OF EDWARD E. ANDERSON

San Francisco, California

Tuesday, January 8, 2008

REPORTED BY
LYNNE LEDANOIS
CSR No 6811
Job No. 79526

customer services – and then the station manager --

Q. Do you recall that person's name?

A. No, I can't - I had it written down, but I can't recall his name. His first name was Arthur. That's all I can tell you.

Q. And did you meet one-on-one – let's just start with Mr. Olson, Did you meet one-on-one with him or was it part of the group meeting with other skycaps?

A. It was a group meeting with the rest of the TWA skycaps.

Q. Was there one meeting with him or more than one?

A. We only had one at that time.

Q. Do you remember what Mr. Olson said in that meeting?

A. Mr. Olson told us American's policy and all that. Then me of all the rest, that said, well, aren't we here under the TWA clauses, you know. And he said, oh, no, this is - he told me no. And I said, well, I think we are, because our lawyer told us that things would continue as the court has -

Q. I'm sorry. I lost you.

A. Everything stays as is.

Q. Okay. You said that to Mr. Olson? [pg 38]

A. I said it. Then he said, oh, no, no, no.

Q. Now, you said a moment ago that he said What American Airlines policy is?

A. Policies were at that time. Informed us on what to expect from American Airlines, and if we wanted to - you know, agreed with them and all that.

Q. Do you remember what he said in that regard?

A. Well, I do remember, because I told him they came around and gave my shifts and told me there was going to be a four-hour shift. And I said, well, everything is supposed to be status quo. He said, what do you mean? I said that it's supposed to be status quo because we were under this court order.

And he said, oh, no, you're not under no court order. You're here under American Airlines. I said, no, we are under a court order. He said, oh, no. I said, well, I'll tell you what, you better call Dallas and find out for sure.

Q. Did you speak to him again about that?

A. Yes. In fact, he came to me about two or three weeks later.

Q. What did he say to you?

A. He said, you're right. He said - but he still did not give me the added hours that I was supposed to be under, the same as TWA. (Pg 39?)

Q. Okay. So let me see if I understand. You mentioned a moment ago that you thought there were a total of maybe nine skycaps on your shift at TWA. -

A. Yes.

Q. - and about 12 go 13 skycaps at TWA altogether. -

A. Yes.

Q. - just before the acquisition?

A. Well, close to that, yes.

Q. I understand. It' approximate. Do you know if all of the TWA skycaps became American Airline employee skycaps?

A. No. They did not.

Q. When you became an American Airlines skycap, can you estimate for us how many other TWA skycaps also joined American?

A. From San Francisco, I think it was six of us.

Q. When you joined American, were you the most senior skycap at TWA?

A. No. I was the lowest.

Q. Okay. And do you know if the skycaps who joined American joined because of their minority joined because of their seniority at TWA?

A. No. I don't know that? [-40–

- - - -

to you about it?

A. And told me that I was right and that we were under the court order and that with my seniority I should be able to pick the time I want to work, you know - well, not just me pick the time..

But then he asked me what would I consider to be a good time. That was after, you know. I said, well, 6:30 or 6:00. He said, oh, no, we have too many on that. He said, you'll work from 8:00 to 4:00. He said – I said, okay, 8:00. And he said, fine. He said, you'll work from 8:00 to 4:00.

Q. Did that change?

A. No. That's what I've been on ever since then, but I still did not get my six hours that I should have.

Q. You just said he told you 8:00 to 4:00?

A. Yes, - I mean 8:00 to 12:00. I'm sorry.

Q. That's fine. I just wanted to clarify. So Mr. Olson is the one who told you that you would be working from 8:00 to noon? [-53-]

A. Right.

Q. When did you first, if you can recall - well, never mind that.

When you first began working for American Airlines in 2001, the skycap did not collect this $2 per bag fee; right?

A. No, they did not.

Q, That went into effect in '05, I believe; right?

A. Yes.

Q. So let's talk about - let's move from the period that American acquired TWA and we'll move forward to when that fee was instituted, but not quite there yet. Okay?

MR. ROESTI: Will this be a good time for a break?

MR. O'BRIEN: Yes. Good. Let's take a short bread, and I can look at the documents that you and Mr. Anderson have that we've talked about earlier.

VIDEOGRAPHER: We are now going off the video record. The time is 11:07 a.m.

(Recess Taken)

VIDEOGRAPHER: We are now back on the video record. The time is 11:23 a.m.

BY MR. O'BRIEN:

Q: Let's go back chronologically, Mr. Anderson, to [-54-] the point where I think we left off. We had gotten to the point where the acquisition of TWA had gone through and you had started working as a skycap for American, and now we will move forward, but prior to the time that the $2 per bag charge was instituted, all right, so that's the time period for these questions I'm going to be asking you.

A. All right.

Q. When you started working as a skycap for American in 2001, did you have a set location at the curb that you always took during your shift?

A. No.

Q. How would you determine what position --

MR. ROESTI: Wait a minute.

You indicated with your hand that you might want to say more. Did you complete your answer?

THE WITNESS:. Well, sorry. I would like to say more.

BY MR. O'BRIEN.

Q. Sure.

A: I had a location. It was at the west end of the airport. All the contractors were down where the heavy traffic came and I was up at the other end. There was about three others up there with me at thetime. There was always three of us up there.
[-55-]
- -

A. Yes.

Q. Let's go back then to the period between December of '01, when American took – when you went to work for American, and before the time that the bag charge was instituted.

Did you have any kind of physical work station or podium that you worked at or were regularly assigned to during that period?

A. This was before? Yes.

MR. ROESTI: I want you to be clear on the time. Don't just say "this is before." So what time period are you talking about?

BY MR. O'BRIEN:

Q. So go ahead.

A. You asked me did I have a station?

Q. Yes.

A. No, I did not have - well, I could work up there at the west end, any one of the podiums that were up there, which was three to four podiums, depending on how busy they were.

Q. When customers - strike that.

When people would drive in to the curb to check [-67-]

- -

to the time that the bag charge was instituted, did you ever put in for a transfer to any other city that American flew out of?

A. We were not allowed to put in for a transfer by court order. Everything stayed status quo. We were not allowed to work any overtime. All this stuff was on the status quo.

Q. So my understanding is, you did not try to transfer?

A. I spoke verbally to them, and they said that the contract - in fact, when Mr. Olson talked to us, TWA skycaps said they went along with Arthur, they told us then that we would not be able to transfer. They told us this.

MR. ROESTI: And then you said something to them at the time then? Is that correct?

THE WITNESS; I said that's bad. I would like to transfer to St. Louis. But that was it. You know, you're not allowed to do those things.

BY MR. O'BRIEN: Q. That was applied to all of the skycaps?

A. Yes.

Q. And you said a moment ago you could not work overtime?

A. No overtime. [–69-]

- -

No, I never gave up any hours. I could not pick up any hours at all, none whatsoever.

Q. Would you change shifts to trade days that you worked sometimes.

A. No, because the TWA skycaps were working mornings.

Q. All of them were?

A. All of them, yes.

Q. Including you?

A. M-hm.

Q. You have to answer yes.

A. Yes, after I once got it settled that - I was put behind - I was even put behind the contractors. They were working mornings and I was working in the evening. What I mean, I came in at 10:00 and work to 2:00. There's nothing going on at that time.

Q. And that was something that affected all of the TWA skycaps?

A. No. Only me.

Q. What period of time are you talking about?

A. From 10:00 to 2:00.

Q. Okay.

A. When I should have been working early morning, because the contractors, they had given all the good shifts to them and had me on the worst shift there was. [-74-]

Q. You were the least senior of the TWA - former TWA skycaps at that point?

A. Yes,

Q. Okay. I understand. Let's then move up to August of 2005, when this bag charge is instituted.

Before the bag charge is instituted, how much money were you making in tips?:

A. Before, I would say anywhere from maybe 75 to $80, even maybe some days 100.

Q. But you have no record of that?

A. No, I don't have records.

Q. Do you remember earlier this year you filed a claim with the labor commissioner for lost tips?

A. Yes.

Q. Do you remember the amount that you claimed to have been lost?

A. I think I told them anywhere from 75 to $100, I believe.

Q. Do you remember what the total amount was in that claim?

A. No, I don't, because -

MR. ROESTI: Again, you're talking per day; is that correct, or per week?

MR. O'BRIEN: No, I was talking about the amount of his claim. [-75-]

MR. ROESTI: I'm talking about - he's talking figures 75 to 80. That was per day.

THE WITNESS: That was per day.

BY MR O'BRIEN: Q. I understand your testimony in that regard, but I've moved on to a different topic.

With respect to your labor commissioner claim, you claim total lost tips of $4,000 total; is that right?

A. That was for the period of time that - at that time when I filed, yeah, that was probably it.

Q. That was from August of '05 to February of this year - or February of '07 rather?

A. Probably.

Q. Okay. So for that period of time, you claimed that you had lost tips of $4,000?

A. Close to it, I guess.

At that time when I did that, I figured - I don't remember exactly what it was, but I figured from the amount of money that I did not get from tips.

Q. What are you making in tips now?

A. I get anywhere from - oh, the highest I get, I would say, about $5, $60, something like that.

Q. Per shift?

Q. And that's on good days. Most of the time it's [-76-]

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the $2-per-bag fee, did you have to start using a podium with a computer on it to do something different than what you had done before that bee was instituted?

A. Yes.

Q. And was this slightly different than what you had worked with before?

A. No.

Q. You would look up, for example, their reservation, their itinerary, issue the claim check, issue the bag tag; right?

A. Yes.

Q. That was true both before the $2 fee went int into effect and afterwards?

A. No. My podium was down there with theirs when it started n the 15th.

Q. Still at the west end?

A. No. It was at the east end –

Q. Let's back up then.

A.– with them. [-89-]

Q. Let's back up then a minute because we missed that part.

When you started working as an American employee, my understanding of your testimony was that you worked at the west end of the curb?

A. Yes.

Q. Did you change to the east end at some point?

A. They had us over at the east end only when they started the initiation of a $2 per bag.

Q. So were all of the skycaps at that point at the east end?

A. Not all of them, but – yes, I guess they were. Because the belt was broken, or something, down at the other end, so they were all up there.

Q. When the bag fee went into effect in August of '05, counting you plus any other skycaps who were working, including the ones who worked for Globe, how many skycaps would you estimate were working during the shift you were working?

A. At the east end, you're talking about?

Q Total.

A. Total, I would say – well, at that time, it had to be about six or seven, I believe, including –five or six or seven.

Q. Working the same shift as you? [-90-]

A. Yes.

Q. How many skycaps work now the same shift as

you?

A. Well, it depends on time of the year, but right now, there's three down there at their end and I'm up at the other end.

Q. Is three an average for the year?

A. No.

Q. What would be the highest number at the present time?

A. I think, if I can remember correctly, to the best of my recollection, there would be anywhere from five to six on a busy day.

Q. That would be like, for example –

A. Weekends. Holidays.

Q. — around Thanksgiving?

A. And weekends.

Q. But now you say there were only three skycaps?

A. Working, yes.

Q. On the same shift as you?

A. Yes. They got rid of some.

Q. Have you continued to work at the east side?

A. No. I only worked at the east end just

two days when they started the program of the $2 a day. I worked there two days, and they moved me from there [-91-] - -up there by myself. The others were still down there after those two days.

Q. Those are all the Globe contract employees?

A. Yes, all Globe contractors down here.

Q. Okay. Did someone who was a supervisor tell you that you need – this is where you need to work?

A. Yes.

Q. Who?

A. First of all, they had somebody come in from Globe. They had a black lady who was in charge and they were setting up – and they decided to move me from there up there by th – to where I was up by myself.

Q. My question was a little bit different. Did any American employee tell you that?

A. No, an American employee did not tell me. Because they changed my code and everything else when they moved me up there. I had the same code before, and they moved me from there up there. And they changed my code and gave me a separate –

MR. ROESTI: When you say a phrase like "up there," you know, I don't know what you're talking about. So if you could say up there on the east or the west end.

THE WITNESS. On the west end.

MR. O'BRIEN: Okay. Let's take two seconds so [-92-]

- - - -

Q. So the number of skycaps for American at SFO has gone down over the years?

A. Yes

Q. That was –

A. They were checking the whole American thing, and so they gave me that and they gave me a new code. Then I asked Jocelyn and she said, that's your podium. Nobody is supposed to bother it. That is yours.

Q. Do you know who this person from Seattle was?

A. No. She was with – overseeing their whole operations. That's all I know.

Q. Was she a Globe employee?

A. Could have been.

Q. You don't know one way or the other?

A. No, I don't know.

Q. And then after that, Jocelyn indicated that's your podium?

A. That – that was my podium.

Q. Now, earlier we talked about the fact that when you started working at the curbside for American, there were more skycaps altogether then than there are now, right?

A. Yes.

Q. So the number of skycaps for American at SFO has gone down over the years?

A. Yes.

Q. And before you – when you were describing the physical layout to us earlier, you talked about there [-98-] being an east curb and a west curb. Does everybody work at the same curb now?

A. There is a miscommunication on that.

Q. Okay.

A. It's one curb. And there is an east end of the curb and then there is a west end of the — of American Airlines, you know. So it's the same curb, but just on different ends of the building. I'm at the last door of American Airlines.

Q. And if I go inside from the curb, is there an American ticket counter inside the whole length of that curb?

A. There was until the Midwest and Canadian Pacific – Canadian Airlines is in there.

Q. So the counter is a little bit smaller?

A. It's not too much smaller, but it is smaller, yes.

Q. And did that move you?

A. No.

Q. So are you physically in front of the other airlines?

A. Yes, I am.

Q. Are you under an American Airlines sign?

A. No. I was until they moved those in. And then before when they moved them in, they had American up [-99-] there also. Then they took American completely out, and they have Midwest and Air Canada now.

Q. Have you --since that change has occurred where these other airlines have taken over some of the counter space, have you spoken to any of your managers or supervisors about moving down the curb so you're in front of an American ticket counter?

A. They cannot move me down there.

Q. Why is that, sir?

A. Because the belt is up there. I've got a separate belt up there, and they have a separate belt at the other end. They are only at each end, the east end and the west end.

Q. Okay.

A. So they would not be able to move me.

Q. I understand that now. Thanks for clarifying that. So there are actually two belts and they're totally separate from one another?

A. Correct.

Q Are you the only skycap servicing American's belt at that point --

A. Yes.

Q. – or at that location?

A. Yes. [-100-]

Q. She said, I don't know?

A. I don't know.

Q Did she say she would try to find out why?

A. No, she did not say that to me.

Q Have you asked Mr. Olson if you could move to the other belt?

A. I used to ask Ron all the time. I would go back in the back where their office was whenever the machine was broken, and I asked them if I could use another podium. They tell me, no, that's your podium and you stay there. I said it's broke. They said, that's your podium. So that was it.

Q. Let me ask you a question about how you actually used the equipment to do your job. Is the podium you use movable?

A. Yes.

Q. That's on wheels?

A. M-hm.

Q. You have to answer with words.

A. Yes. I'm sorry.

Q. That's okay. That's fine. So that is

portable? It can be moved?

A. Yes.

Q. Do you physically push it out in the morning –

A. Yes, I do. [-102-

- - - -

A. Yes.

Q. Was there anything else that those machines did before the $2 fee was instituted that is different than [-131-] what they do now?

A. No.

Q. After the $2 fee was instituted, was there anything additional that the that the machines did that they did not do before?

A. No.

Q. To the best of your observation, are they the same kind of machines?

A. They are the same machines except when they – just less than a year ago they bought new monitors and installed them in all of them and keyboard. We had – when we first started out, we had just a punch keyboard.

Q. Do you have a regular –

A. Right now, they have a keyboard and a different monitor –

Q. But otherwise –

A. And a mouse.

Q. But are the machines the same otherwise as they were in '01 when you started at American?

A. No.

MR ROESTI: Wait a second.

MR O'BRIEN: You can ask him questions when you want.

BY MR. O'BRIEN:

That's why I asked the questions I did a minute [-132-]ago. Let me back up a minute here.

Before the bag fee was instituted in '05, the machines that you used, you could use to print a boarding pass, print a bag tag and check itineraries, right?

A. No. Check Itineraries, that was – when they give you an itinerary, you just use that on your computer to bring up the tag and the boarding card.

Q. That would print out the final tag for wherever the bag had to go?

A. Right.

Q. Print out the final destination fee for the boarding pass?

A. Yes.

Q If there were multiple legs, could you print out a boarding pass for each of the tags for the passenger?

A. Yes.

Q. And the machine as you use it now, you do all of these things too?

A. Well, once you put your key in there and you get the person's identification with their name and all that, it prints – it does it all automatically. It does the final destination. If it's for three legs, it automatically does that. And then you repeat it back to [-133-] the passenger. And if one of the legs is missing, they say,

well, so and so – you say, well, you have to go inside and they will take care of that for you.

Q. You mentioned that recently they changed the monitors?

A. Yes.

Q. And they gave you keyboards?

A. Yes, a keyboard and a mouse.

Q. Has the rest of the podium stayed the same over the years?

A. Yes, the podium has.

Q. Is it the same kind of podium that the Globe contractors use?

A. Same.

MR. ROESTI: Same.

MR. O'BRIEN: Thanks for clarifying that.

MR. ROESTI: I –

MR. O'BRIEN: Sorry?

MR ROESTI: I didn't know if you were done or what you were – you said something and –

MR. O'BRIEN: I said thank you for clarifying that.

MR. ROESTI: Sorry.

MR. O'BRIEN: No problem.
Let's take a five or ten-minute break. [-134-]

VIDEOGRAPHER: We are going off the video record. The time is 1:44 p.m.

(Recess Taken)

VIDEOGRAPHER: We are now back on the video record. The time is 1:56 p.m.

BY MR. O'BRIEN:

Q. Mr Anderson, let me see if I can try to understand something.

Is the reason that you are – is one of the reasons you're upset with your working conditions now is that you're not working the east end of the curb?

A. Well, I would like to be where there is money, yes.

Q. So you want to be at the east end of the curb?

A. I would like to be where there – yes.

Q. Would you be happy at the west end if the machine worked all the time or if you had one that you could switch to when your regular machine broke?

A. Not really, because I'm out there where nobody makes any money at the end. They all stop down there. They'll be bunched up down at the east and I'm up there doing nothing for a half-hour, 15, 20 minutes. Nobody comes up there.

And then occasionally, somebody who's late for a flight, and they look down [-135-] there, they will run down and say, What's going on? I say, I'm blackballed. That's all. They say, What do you mean? I say, That's all right. Just give me your

identification.

And then I check their bag. And they say, I don't understand it. All those people down there, and here you are up here doing nothing. My podium says American Airlines on it, just as big, just like all the rest of it.

Q. So the passengers are not driving up there?

A. No.

Q. And the reason that there is no podiums available at the east end is because that's where the Globe people are already working?

A. Correct.

Q. And they are already working because they start earlier in the day?

A. Yes. And I'm not supposed to be down there.

Q. You're supposed to stay at your station?

A. Yes.

Q. Is there any reason you cannot start earlier?

A. That I can't do what?

Q. Start earlier in the workday.

A. It still would be for four hours. I don't care what time I start. I tried to get earlier when they – I tried even 6:30, and they told me no, that was too [-136-]

- -

THE WITNESS: But it was not in 2005. This

was is 2001 when that took place.

BY MR. O'BRIEN:

Q. When you suggested 8:00 as the start?

A. I did not suggest it. This was after he had given me a shift of 10:00 to 2:00 in '02 – I mean, '01, whenever it was, when I first began, and I told him then that you do not put any contractors over a regular employee, and he told me, I can do anything I want. I do it. He said, I'm going to do. I said, well, you're wrong..If you don't believe me, check with Dallas. Because we're under court order that everything stayed as status quo.

And as it was, status quo, I was working six hours for TWA, and I should have come over at American working six hours too.

Now, American Airlines does honor everything else that was in that status quo, like you cannot transfer, things of the nature like that, they honor that.

Q. What did you say to him, though, about the start time -- about changing the start time?

A. He did not change it until about three weeks later, approximately three weeks later.

Q. I understand that when he did it – [-142-]

- - - -

that the first name or last name?.

A. That was his first name.

Q. And what reason did Mr. Olson – did Mr. Olson allow you to work six hours a day?

A. No, he did not.

Q. Did he give you a reason why you could not.

A. Yes.

Q. What was his reason?

A. The reason was that nobody in American Airlines system in San Francisco works six-hour shift days.

MR. O'BRIEN: Objection, lack of foundation.

THE WITNESS: Less than a week after that, I found out that there were agents working six hours a day, ticket agents. And down on the ramp they had other guys working part-time.

BY MR. ROESTI:

Q. When you say "down on the ramp," what do you mean? [-181-]

PROOF OF SERVICE BY FAX AND MAIL

I, the undersigned declare:

I am over the age of eighteen. I am not related to the

parties in this action. I may be reached at the Law Office of Frederick C. Roesti, 1095 Market Street, San Francisco, CA 99403, Tel (415)552-3733

I served the following documents.

DECLARATION OF FREDERICK C. ROESTI

By FAX and my MAIL as follows: I faxed the documents to the following fax number and I mailed documents by placing them in an envelope with postage paid and placed in the United States Mail addressed to:

Fax (916) 561-0828
Kenneth R. O'Brien, Esq.
Littler Mendelson
2520 Ventura Oaks Way, Suite 390
Sacramento, CA 95833-4227
on the date listed below.

I have read the above statement and declare under penalty of perjury under the laws of the State of California that it is true and correct and was executed in San Francisco, California on May 19, 2007.

_____
Frederick C. Roesti

EXHIBIT NO. 2 TO ROESTI DECLARATION

QUESTIONNAIRE STATEMENTS OF SKY CAPS

Case No. 0703527 WHA
Declaration of Frederick C. Roesti
in opposition to summary judgment

This is a confidential questionnaire for EDWARD ANDERSON

The answers to these questions shall not be given to your employer without your permission. The information is for bid Anderson's attorney, Fred Roesti, Tel 415-552-3733

1. Name KURT DEANG Telephone (510)3592132
2. Age 37
3. How long have you worked as a Skycap at SFO? 20 YEARS
4. What is your location on the curb? EAST END OF AMERICAN CURB
5. What is Ed Anderson's location on the curb? WEST END
6. How much has your income decreased since the $2.00 per bag charge? 50%
7. When Ed Anderson's computer breaks down can he use other computers? NO
8. Are you allowed to use more than one computer? YES
9. Is Ed Anderson prohibited from using more than one computer? YES
10. Do you have bag runners to carry golf clubs and special items to the belt? YES
11. Does Ed Anderson have bag runners to carry special items to the belt? NO
12. How many hours is your shift? 32/HR WEEK
13. Is Ed Anderson treated unfairly by the employer? YES

Explain: COMPUTER BROKE OFTEN / NO CARTS ON HIS END.

14. May we use your name to support Ed's case? YES

My answers are true
Dated 10-31-07 *Kurt*
Signature

This is a confidential questionnaire for EDWARD ANDERSON

The answers to these questions shall not be given to your employer without your permission. The information is for Ed Anderson's attorney, Fred Roesti. Tel. 415-552-3733

1. Name PATRICK JACK Telephone 650) 347 4583
2. Age 59
3. How long have you worked as a Skycap at SFO? 17 YEARS
4. What is your location on the curb? EAST END AMERICAN CURB
5. What is Ed Anderson's location on the curb? WEST END
6. How much has your income decreased since the $2.00 per bag change? 50%
7. When Ed Anderson's computer breaks down can he use other computers? NO
8. Are you allowed to use more than one computer? YES
9. Is Ed Anderson prohibited from using more that one computer? YES
10. Do you have bag runners to carry special items to the belt? SOMETIMES
11. Does Ed Anderson have bag runners to carry special items to the belt? NO
12. How many hours is your shift? 32 HOURS. PER WEEK
13. Is Ed Anderson treated unfairly by his employer? YES

Explain: COMPUTER BRAKES OFTEN

14. May we use your name to support Ed's case? YES

My answers are true.

Dated: 10-31-07 *Patrick Jack*

Signature

This is a confidential questionnaire for EDWARD ANDERSON

The answers to these questions shall not be given to your employer without your permission. The information is for Ed Anderson's attorney, Fred Roesti, Tel 415-552-3733.

1. Name PIDEL LACAMBRA
Telephone (510) 207-8122
2. Age 50
3. How long have you worked as a Skycap at SFO?
9 YEARS
4. What is your location on the curb? EAST END OF AMERICAN CURB
5. What is Ed Anderson's location on the curb?
WEST END
6. How much has your income decreased since the $2.00 per bag charge? FROM SKYCAP TO BAG RUNNER.
7. When Ed Anderson's computer breaks down can he use other computers? NO
8. Are you allowed to use more than one computer?
YES
9. Is Ed Anderson prohibited from using more than one computer? YES
10. Do you have bag runners to carry golf clubs and special items to the belt? YES
11. Does Ed Anderson have bag runners to carry special items to the belt? NO
12. How many hours is your shift? 32/HR
13. Is Ed Anderson treated unfairly by his employer?
YES Explain: OFTEN WHEN COMPUTER DOWN
14. May we use your name to support Ed's case? YES

My answers are true

Dated: 11-1-07 *PidelLacamera*
Signature

This is a confidential questionnaire for EDWARD ANDERSON

The answers to these questions shall not be given to your employer without your permission. The information is for Ed Anderson's attorney, Fred Roesti, Tel 415-552-3733.

1. Name REY LLORRA Telephone (650)784-6052
2. Age 39
3. How long have you worked as a Skycap at SFO? APPROX. 20 YRS.
4. What is your location on the curb? EAST END OF CURB.
5. What is Ed Anderson's location on the curb? WEST END OF A CURB
6. How much has your income decreased since the $2.00 per bag charge? 50%
7. When Ed Anderson's computer broke down can he use other computers? NO
8. Are you allowed to use more than one computer? YES
9. Is Ed Anderson prohibited from using more than one computer? YES
10. Do you have bag runners to carry golf clubs and special items to the belt? YES
11. Does Ed Anderson have bag runners to carry special items to the belt? NO
12. How many hours is your shift? 28 HRS/WEEK
13. Is Ed Anderson teated unfairly by his employer? YES

Explain: IF HIS COMPUTER BREAKS DOWN HE CAN'T CHECK BAGS ANYMORE.

14. May we use your name to support Ed's case? YES

My answers are true.

Dated: 11-05-07 *Rey Llorera*
Signature

This is a confidential questionnaire for EDWARD ANDERSON

The answers to these questions shall not be given to your employer without your permission. The information is for Ed Anderson's attorney, Fred Roesti, Tel 415-552-3733

1. Name STEPHEN OLSON JR. Telephone_____
2. Age 52
3. How long have you worked as a Skycap at SFO? 20 YEARS
4. What is your location on the curb? THIRD
5. What is Ed Anderson's locationon the curb: FIRST
6. How much has your income decreased since the $2.00 per bag charge? $100–
7. When Ed Anderson's computer breaks down, can he use other computers? YES,EVERY MONTH.
8. Are you allowed to use more than one computer? YES
9. Is Ed Anderson prohibited from using more than one computer? YES
10. Do you have bag runners to carry golf clubs and special items to the belt? NO
11. Does Ed Anderson have bag runners to carry special items to the belt? NO
12. How many hours is your shift? 33 HRS
13. Is Ed Anderson treated unfairly by his employer? YES Explain: MACHINES BROKE
14. May we use your name to support Ed's case? YES

My answers are true.

Dated: 10-31-07 *Stephen Olson Jr.*
Signature

EXHIBIT NO 3 TO ROESTI DECLARATION

AMERICAN AIRLINE LETTERS TO ANDERSON

American Airlines

August 11, 2005

Dear Edward Anderson:

In today's highly competitive environment, American must constantly change and adapt to meet the needs of our customers, while doing everything we can to return to profitability. Throughout every aspect of our operation, we are finding new ways of doing business that lower costs and build for our financial future.

One of the initiatives that we are currently testing in other cities is charging a $2 fee for each bag checked at curbside. We are working with our vendors in these locations to identify opportunities to lower costs while continuing to provide outstanding service to our customers.

We plan to extend this test to SFO, effective August 15, 2005, which will affect your current position as a Customer Service Sky Cap. This position is being restructured and will require different skills from those used today, including collection of baggage fees and reconciling cash deposits, entering data into computer masks and assigned shift work.

Because the restructured position is somewhat different from your current position, you have the option to elect layoff. You would be eligible to regular severance pay, as described in the Employee Policy Guide.

If you would like to elect this offer, please complete the attached form and return it to me no later than August 15, 2005. If you choose not to elect layoff, you will work with

your manager to arrange training and scheduling for transition to the newly created position.

Sincerely,

Ron Olson (JJ)
Ron Olson
Passenger Service Manager, SFO

Attachment: Layoff Form

cc: Personnel File
Talent Services - MD 5177 HDQ1

Personally handed to employee
Date 8/11/05 By*Jocelyn J*

Passenger services, PO Box 8277,
Airport Station, San Francisco,
California 94128-3400

DOCKET NO. 08-16586

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDWARD E. ANDERSON

Plaintiff and Appellant,

v.

AMR, The parent of AMERICAN AIRLINES, INC; AMERICAN AIRLINES

Defendants and Appellees..

On appeal from the Judgment and Related Orders of the United District Court for the Northern District of California,

The honorable William H. Alsup,
Case No. 3:07-cv-03527-WHA

APPELLANT'S PETITION FOR REHEARING

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Attorney for Appellant
Edward E. Anderson

A. INTRODUCTION

The case involves an African American skycap, age 73, at the San Francisco Airport who was denied an available six hour shift and denied a work location by American Airlines (American) when it instituted a $2 per bag fee in August 2005. This drastically reduced skycap tip income, which made shift selection and work location more important (BS 106-107).

Plaintiff and Appellant (Anderson) filed age and race discrimination, and retaliation charges under the California Fair Employment and Housing Act, and a separate cause of action for intentional infliction of emotional distress.

Statement of Counsel re Age and Race Discrimination: In the judgment of Anderson's counsel, the Memorandum Opinion overlooked material points and fact and law when the Memorandum Opinion at page 2-3 stated, "Anderson provided no evidence to refute AMR's nondiscriminatory explanation for its differential treatment of Anderson - namely, that he was the only non-contract sky working at the airport and that he needed to at a specific terminal for tracking purposes."

As discussed below: Anderson provided material evidence that refuted this explanation as follows:

1. **Denial of Six Hour Shift:** The material evidence presented by Anderson, as discussed below, showed that American's proffered explanation was pretext because its explanation had **no relationship** to the denial of the requested six hour shift. That is, Anderson could work [-1-] the available six hour shift he was denied from the terminal of podium he was assigned to work.

2. **Restricted work location**: The material evidence presented by Anderson, as discussed below, showed that

American's proffered explanation was pretext because (1) Anderson's terminal podium was identical to the terminal podium used by the non-contract skycaps at the East end of the curb; (2) Terminal podiums were moveable. Anderson could have been assigned to work on his terminal podium at the East end of the curb; and (3) When Anderson's terminal podium was broken, even though Anderson's could work on other terminal podiums, Anderson was prohibited from working at the East End. Instead, he was instructed to sit and do nothing, or go home.

Statement of Counsel re Retaliation: In the Judgement of Anderson' counsel, the Memorandum overlooked material points of fact and law when the Opinion at page 3-4 in affirming summary judgment in favor of American and against Anderson regarding the retaliation cause of action, stated, "In short the conditions of Anderson's employment remained the same after he complained about the new check bag fee, and thus summary judgement was appropriate because no adverse employment action was shown."

As discussed below, Anderson presented material evidence, overlooked in the Memorandum Opinion that (1) Before Anderson's complaint about the $2 bag fee, he worked at, but was not restricted to work only at, the least trafficked West End; (2) After making and filing of [-2-] complaints, Anderson was permanently restricted to work only at the least trafficked West End; (3) After making and filing complaints, Anderson was permanently prohibited from working the East End where the greatest passenger traffic was; (4) After making and filing complaints, Anderson was subjected to onerous employment conditions that did not apply to other sky caps, condemned to earn less income at the least desirable location, and (5) when his terminal broke, Anderson was instructed to sit or go home. Before making and filing complaints, Anderson was not singled out and treated in this manner. As a result, this material evidence presented a question for a jury, not to be disposed on summary judgment. Burlington Northern and Santa Fe

Railway Co. v. White (2006) United States Supreme Court Docket No. 05-259)

Statement of Counsel regarding Intentional Infliction of Emotional Distress: In the judgment of Anderson's counsel, the Memorandum Opinion at pages 4-5 overlooked material points of law and fact when it stated that "Anderson has made no showing that AMR's conduct was so egregious' [that] "an average member of the community would arouse []resentment toward [AMR] and lead him to exclaim, "Outrageous."

As discussed below, the evidence presented, and the reasonable inferences from such evidence presented, showed that Anderson was isolated from other sky caps after making and filing his complaints. Although Anderson had the most seniority, he was treated as if he had the least seniority. Forced to work alone at the West End, isolated from other [-3-] sky caps, Anderson was ridiculed in front of other sky caps and the public. This treatment extended far beyond "mere insults, and indignities, and annoyance, or petty oppression," and raised a question of fact for a jury to decide that could not, that could not be disposed on summary judgment, Alcorn v. Anbro, Engineering, Inc. 3 d 493.

B. MATERIAL POINTS OF FACT AND LAW WERE OVERLOOKED IN THE MEMORANDUM OPINION. THEY JUSTIFY REHEARING AND REVERSAL OF THE SUMMARY JUDGMENT.

1. Standard for Review.

The standard for appellate review is that when a plaintiff has produced "specific evidence through affidavits and admissible discovery material to show that material disputes of fact exist," summary judgment in favor of a defendant must be reverse, not affirmed. Hunter v. Pacific Mechanical Corp (1994) 37 Cal. App. 4th 1282, 1286.

Anderson has presented specific evidence through affidavits and in his deposition testimony regarding material facts that were overlooked in the Memorandum Opinion.

2. Anderson was the senior sky cap at all relevant times.

The Memorandum Opinion states that, "When Anderson first began working at the west end of the curb check-in, other sky caps who were older and were also African American were stationed at the More desirable east end" (page 3). This overlooked the evidence that as these skycaps retired, their slots at the more desirable east end were taken by younger, contracted sky caps, who were not African American in disregard [-4-] of Anderson's seniority and his right to exercise seniority under the Status Quo. Agreement and as an American employee.Anderson testified in sworn declaration:

> 'The agreement [under which American purchased TWA] provided that skycaps from TWA were to remain on status quo, **so that we could exercise seniority over all skycaps at American Airlines because of the status quo agreement, and because we were employees of American Airlines, who were to have preference over all other sky caps that were employed by its independent contractors for American Airlines.**
>
> Declaration, BS 178, in 25-BS 179, in 2, emphasis added)[1]

In deposition, Anderson testified that as former African American TWA skycaps who had more seniority retired, their location at the more desirable East End was assigned to contracted employees, who were not American employees and had less seniority than Anderson:

QUESTION: As far as you know, did they [the African American former TWA skycaps] all leave American when they retired?
ANSWER: Yes.
QUESTION: As they lest the curb [at the better East End', were their slots taken over by a contract employee?
ANSWER: Yes (BS 071 in 21 to 72 in a)

On August 15, 2005, when American implemented its $2 per bag fee and required sky caps to collect the fee for American, and at all other relevant times, Anderson, age 73, was the oldest skycap employed at American, including the contracted skycaps. He was entitled to exercise

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(fn 1) "BS" refers to the bates-stamped page of the record filed by Appendix

seniority in shift and location selection over all other skycaps (BS 051-052, 109). Due to a combination of attrition, and American not hiring African America skycap [-5-] directly or through its independent contractor, Anderson was one of two remaining African American skycaps, and the only African American on his shift (BS 058, in 2 to BS 059, in 20; BS (80 in 1-5).

3. Material, overlooked evidence refuted the explanation given for age and race discrimination regarding the denial of a six hour work shift.

On August 15, 2005, Anderson was working a four-hour shift. After the $2 per bag was implemented, Anderson requested an available six hour shift because of the drastic loss of tip income (BS 179). His request was denied although he was the oldest employee, and entitled to use his seniority rights for shift selection (BS 179 in 7-27). Anderson provided the following Declaration testimony that was overlooked.

On about August 15, 2005, I had a private meeting

> with Ron Olson when he wanted me to sign an agreement to work for the $2 baggage charge. At that time, I talked with him about my shift. I asked if I could keep my tips without the $2 baggage service fee, due to status quo agreement. He said, "'No." **Then I replied, "Does that mean I will get my six hour shift." I asked about the six hour shift because I knew the $2 per bag service charge would significantly reduce my tip income.** I had learned that other American Airline Employees could work for six [hour] shifts, and some G-2 skycaps were working a six hour shift. **My request to work a six hour shift in August (2005) was denied, although other people worked six hour shifts, and I had more seniority than any of them.**
>
> (Declaration, BS 179 in 18-26, emphasis added)

This was specific, admissible, material evidence of age and race discrimination regarding the denial of the requested six hour shift. It refuted American's proffered nondiscriminatory explanation ('namely, that he was the only non-contract sky working at the airport and that he needed to at a specific terminal for tracking purposes") because there was **no** [-6-] **relationship** between the reason given and the denial of a six hour work shift. That is, because Anderson could be assigned to work a six hour work shift using his assigned terminal podium.

4. Material, overlooked evidence refuted the explanation given for age and race discrimination regarding the restriction to working only at the West End of the passenger curb, that was least trafficked by passengers.

On August 15, 2005, although the West End was the primary location where Anderson was assigned (BS 56, 70), Anderson was **not** restricted to working at the West End with the least passenger traffic. In deposition, Anderson testified:

QUESTION: When you started working as a skycap for American in 2001, did you have a set location at the curb that you always took during your shift.
ANSWER: No.

(BS 67, in 9-12)
Nor was Anderson restricted to working at only one terminal podium. Anderson testified:

ANDERSON: You asked me did I have a station [before the bag charge was instituted]?
QUESTION: Yes.
ANDERSON: No, I did not have - well, I could work up there at the west end any one of the podiums that were up there, which was three or four podiums, depending on how busy they were.

(BS 72, in 18-23)

Existing age and race discrimination in location assignment.: This material, overlooked evidence refuted American's proffered explanation ("namely, that he was the only non-contract sky working at the airport and that he needed to be at a specific terminal for tracking purposes") regarding [-7-] age and race discrimination by American with regard to the continued assignment of Anderson to the West End, when slots on the East End became open as the African American skycaps from TWA retired. That is because Anderson could use the same terminal podiums used by the former TWA skycap employees as they retired. This evidence refuted American's proffered reason for discrimination prior to August 15, 2005 and the time it implemented the $2 per bag charge.

Age and Race Discrimination re location after August 15, 2005: Twice, after the $2 bag fee was implemented, Anderson requested assignment to the East End and was denied. At no time was Anderson given the reason that American has proffered ("namely, that he was the only non-contract sky working at the airport and that he needed to

at a specific terminal for tracking purposes"). This material evidence overlooked in the Memorandum Opinion refuted the above proffered explanation.

First, Anderson testified that he was told he was denied relocation to the East End due to the location of the baggage belt, not the terminal podium. This refuted the proffered reason based on the assignment to terminal podium.

> QUESTION: Have you - since that change has occurred where these other airlines have taken over some of the counter space, have you spoken to any of your managers or supervisors about moving down the curb so you're in front of an American ticket counter?
>
> ANSWER: They cannot move me down there.
>
> QUESTION: Why is that, sir?
>
> ANSWER: Because the belt is up there... I've got a separate belt up there, and they have a separate belt at the other end. They are only at each end, the east end and the west end.
>
> QUESTION: Are you the only skycap servicing American's belt [-8-] at that point - or at that location?
>
> ANSWER: Yes.
>
> (BS 82, in 3-25)

The second denial was arbitrarily. No reason was given This arbitrary denial refuted the reason proferred. Anderson testified:

> QUESTION: You said that you've gone into the office to ask if you could move the other belt; right?

ANSWER: Yes.

QUESTION: And I think that you indicated that he just says you can't do that, right?

ANSWER: Yes.

QUESTION: Does he explain to you why you can't move?

ANSWER: No. No one ever - no individual at American Airlines has ever explained to me why I couldn't do it.

(BS 84, In 8-16)

Most important the terminal podiumswere moveable:

Anderson's terminal podium could be set up anywhere, at the East or West End. Therefore any claim that American needed to track his work by requiring him to work on only one terminal podium did not justify isolating Anderson at the West End and refusing his request to be assigned the East End. In her declaration, Anderson's supervisor Jocelyn Javier admitted that Anderson's terminal podium could be "set up" at the East End. She testified:

> There are two locations where skycaps who work at American's curbside **set up** their bag tagging machine podiums. One location is at the eastern end of the curb, near the beginning of American's operation at SFO, and the other is location s at the western end of American's operation." (fn 2)

(BS) 126, in 23-26, emphasis added)

Furthermore, all podiums were similar and operated the same way. (Anderson, BS 95, In 4-14; Javier,

BS [126, In 14" Olson, BS (129, In 18). Contrary to American's proffered explanation, Anderson testified that the terminal podium assigned to him, was also used by contract employees. In like manner, Anderson's work could be tracked on any terminal podium he used.

> ANDERSON: 'But when the gave - after 7, after he told me this is your machine, that is the only one you use, nobody that I know of used it, but, however, when I come in in the morning sometimes, I could tell it had been used.

(fn 2) In his deposition taken by American, Anderson also testified that his terminal podium was moveable and had wheels. He pushed it out and set it up every day (BS 227, In 5-25). This portion of Anderson's deposition omitted from American's moving papers, was filed by Anderson with the Court on May 19, 2008. This was cumulative evidence to the sworn testimony of Javier. However, Anderson submits it should be considered because it was filed **before** the trial courts Order May 21, 2008, that allowed the late-filing of documents already filed, and rule, "any yet further, untimely filed evidence submitted by plaintiff, however, will not be considered.")BS 245)

[-9-]

> QUESTION: Do you know if someone employed by Globe has used machine number 7?

ANSWER: That would have to be them because they are the only ones there now, and I'm the only one there. And they have been used.

(BS 88 in 22 to 89 in 1)

For these reasons, Anderson presented specific material evidence that refuted the proffered explanation of American. Therefore, on rehearing, the entry of summary judgment in favor of American must be reversed.

5. Material, overlooked evidence refuted the explanation regarding retaliation. It presented a question for the jury, that could not be disposed on summary judgment.

As denied above, material facts overlooked in the Memorandum Opinion refuted the conclusion in the Memorandum Opinion that "in short,]-10-] the conditions of Anderson's employment remained the same after he complained about the new check bag fee, and thus summary judgement was appropriate because no adverse employment action was shown."

Reference to federal law case is appropriate to establish the minimum standard for retaliation under Fair Employment and Housing Act. In Burlington Northern and Santa Fe Railway Co. v. White (2006) United States Supreme Court Docket No. 05-259, the Supreme Court, held that imposing arduous working conditions on an employee even within the same job classification may constitute retaliatory discrimination. The Court explained:

> Almost every job category involves some responsibilities and duties that are less desirable than others. **Common sense suggests that one good way to discourage employees such as White from bringing discrimination charges would be to insist she spend more time performing the most arduous duties and less time performing those that are**

> **easier or more agreeable.** This is presumable why the EEOC has consistently found "[r]etaliatory of "forbidden retaliation." 2, EEOC work assignments" to be a classic and" widely recognized example of 1991 Manual Section 1614.7, pp. 613-31 to 614-32. . . [an] employer's ordering an employee "to do an unpleasant work assignment in retaliation" for filing racial discrimination complaint . . . ('An] Employer enjoined under Title VII ("from imposing unpleasant work assignments upon an employee for filing charges.")
>
> ...
>
> Whether a particular reassignment is materially adverse depends upon the circumstances of the particular case, and "should be judged **from the perspective of a reasonable person in the plaintiff's position:** considering "all the circumstances." *Oncale,*523 U.S. at 81. But here, the jury had before it considerable evidence that the track labor duties were "by all accounts more arduous and dirtier", that the the forklift operator position was objectively considered a better job and the male employees resented White for occupying it", 364 F. 3d at 803 ... Based on this record, a jury could reasonable conclude the reassignment of responsibilities would have been materially adverse to a reasonable person." [-11-]
>
> (Burlington. supra. emphasis added)

The Burlington court went on to note that a jury could reasonably conclude a suspension without pay for 37 days was "economic retaliation."

Here, the material facts overlooked in the Memorandum Opinion showed that **after** Anderson's complaints to Supervisor Olson (BS 179) and **after** Anderson filed complaints with the California Labor Commission and Fair Employment and Housing Commission (BS 111), Anderson suffered **and continued to suffer adverse actions.** The material evidence of these adverse actions that was

overlooked in the Memorandum Opinion included: (1) the **denial** of the six hour shift (BS 179); (2) the **restriction** to working **only at** the West End that was the least desirable work location because passenger traffic began at the East End (BS 72 In 24-73 In 6) and (3) **by himself** (BS 82 In 21-25); (4) the **permanent prohibition** against Anderson working the more desirable East End location (BS 84 In 8-12), **despite** (5) the fact Anderson has more seniority than any other skycap, contractor or not (BS 51-52, 109) 6) even when his terminal podium broke down, and (7) the **requirement** that Anderson "sit" by himself or "go home" when his terminal podium broke (BS 87 In 16-24).

As a result of these adverse actions, Anderson, with the most seniority, was relegated to work alone at the West End by himself where he earned less tip income than the most junior skycap at the East End. Anderson testified about the economic effect: **"I would have liked to have been able to check anywhere, anytime I got a bag, check in, where I - so [-12-] I could make some money. I could not make money."** (BS 86 In 3-5) **" I don't sleep at nights because I think about how I am going to meet my bills and things."** (BS 108 In 22-23).

Anderson testified his tip income was reduced at least $40 per four hour shift as a result of American's implementing its $2 per bag fee and the **restrictions** and **prohibitions** that American imposed on Anderson that did not exist before the $2 bag fee and Anderson's complaints (BS 105). American admitted this conduct resulted in "economic retaliation." Based on its examination of Anderson written reports - and Anderson testified he did not report every time his terminal podium was broken - American admitted that Anderson had lost the equivalent of tip income for a minimum of 18 days due to its treatment of Anderson that prohibited Anderson from using other terminal podiums and required Anderson to "sit" or "go home" when his terminal podium was broken (BS 119 In 10-13).

The Memorandum Opinion also overlooked material

evidence submitted by American that consisted of Anderson's sworn declaration to DFEH, that, "From August 2005 to the present [January 24, 2006], I was subjected to disparate treatment. For example, my supervisor, Ron Olson, Customer Service Manager, Jocelyn Javier, and Station Manager Phil Bock, moved me to a different job location away from my co-workers and did not issue me proper equipment to do my job."

Therefore, on this material, overlooked evidence that documented adverse actions by American **after** Anderson's complaints, Anderson submits this evidence 0f adverse actions presents presented a jury question [-13-]whether American engaged in "retaliatory discrimination" that can not be disposed on summary judgment in favor or American. White, supra.

6. Material, overlooked evidence provided a question for the jury regarding intentional infliction of emotional distress that cannot be disposed in favor of American on summary judgment.

Employers may be liable for intentional infliction of emotional distress toward employees that either (1) contravenes fundamental public policy of (2) exceeds the risks inherent in employment. (Tameny v. Atlantic Richfield Co. (1980) 27 Cal 3ni 167. McKlosky v. Regents of the University of California (2008) dd Cal. 4th 876, 901-903). Where reasonable minds may differ, it is for the jury subject to the court, to determine, whether, in the particular case, the conduct has been extreme and outrageous to result in liability. Alcon v. Anbro Engineering, Inc. (1970)2 Cal 3rd 493.

Here, as detailed above, Anderson submits the material evidence overlooked in the Memorandum Opinion showed that American condemned Anderson to work alone, isolated from other employees, at the least desirable location. The undesirable work location reduced his tip income to a level below the most junior skycap at the East End. Then, when

Anderson's terminal podium broke down, to the ridicule of Anderson in front of American skycaps and the public, Anderson was required to "sit" and do nothing until his broken terminal podium was fixed or go home. To Anderson, per his testimony, this was the "quickest way [for American] to get rid of all employees" and replace them by contract employees. [-14-]Anderson testified the same thing around the country, in St. Louis, and Boston, to eliminate employees and replace them with skycaps.
(BS 101-102).

For these reasons, and based on this material evidence overlooked in the Memorandum Opinion, Anderson submits the specter of the most senior skycap being treated in this manner, relegated to ridicule and isolation, raises a question for a jury to decide , whether a reasonable person would be outraged by such employer conduct. Anderson submits reasonable persons should be ouraged. Therefore, summary judgment should be reversed, and the issue of intentional infliction of emotional distress should be submitted to a jury.

C. CONCLUSION

For all these reasons, plaintiff and appellant petitions for rehearing, on the basis of material evidence, overlooked in the Memorandum Opinion, requests the court rehear and reverse the summary judgment that was entered in the favor of American, and award Anderson costs and fees on appeal.

Respectfully submitted

Frederick C. Roesti

Dated" October 26, 2009

NAZIR v. UNITED AIRLINES, INC. (2009)
178 Cal. App. 4th 243

[No. A121651. First Dist., Div. Two. Oct. 9, 2009.]

(Superior Court of San Mateo County, No. CIV 458060, Marie S. Wiener, Judge.)

(Opinion by Richman, J., with Haerle, Acting P.J., and Lambden, J., concurring.)

COUNSEL

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OPINION

RICHMAN, J.-

Our Supreme Court has said that the purpose of the 1992 and 1993 amendments to the California summary judgment statute was "to liberalize the granting of motions for summary judgment." (Aguilar v. Atlantic Richfield Co. (2001) 25 Cal. 4th 826, 854.) It is no longer called a "disfavored remedy." It has been described as having a salutary effect, ridding the system, on an expeditious and efficient basis, of cases lacking any merit. And that it has, as shown by the many cases affirming a summary judgment.

At the same time, the summary judgment procedure has become the target of criticism on a number of fronts. Some particular criticism is directed to the procedure in employment litigation, including that it is being abused, especially by deep pocket defendants to overwhelm less well-funded litigants.

More significantly, it has been said that courts are sometimes making determinations properly reserved for the factfinder, sometimes drawing inferences in the employer's favor, sometimes requiring the employees to essentially prove their case at the summary judgment stage. Here we confront the poster child for such criticism, in a case involving what may well be the most oppressive motion ever presented to a superior court.

Plaintiff Iftikhar Nazir, a man of Pakistani ancestry, worked for United Airlines (United) for over 16 years, during which time he was called scurrilous names and was the victim of numerous other indignities. Plaintiff reached the level of mechanic supervisor, the only person of color to ever hold that position. He was terminated in 2005 by his supervisor Bernard [178 Cal.App.4th 249] Petersen, on the basis that plaintiff violated United's zero tolerance policy in an incident with a female employee of an outside service provider. Plaintiff sued United and Petersen (when referred to collectively, defendants) in a complaint that, save perhaps for two battery and fraud causes of action, asserted rather typical claims grounded on harassment, discrimination, and retaliation. What ensued was hardly typical.

Defendants filed a motion for summary judgment/summary adjudication, seeking adjudication of 44 issues, most of which were not proper subjects of adjudication. Defendants' separate statement was 196 pages long, setting forth hundreds of facts, many of them not material--as defendants' own papers conceded. And the moving papers concluded with a request for judicial notice of 174 pages. All told, defendants' moving papers were 1056 pages.

Plaintiff's opposition was almost three times as long, including an 1894-page separate statement, papers the trial court would later disparage as "mostly verbiage," a description with which, as will be seen, we disagree. Curiously, no such criticism was leveled at defendants' papers, not even those in reply, papers that defy description.

Defendants' reply included, and properly, their response to plaintiff's additional disputed facts. Defendants' reply also included, not so properly, a 297-page "Reply Separate Statement" and 153 pages of "Exhibits and Evidence in Support of Defendants' Reply." And the reply culminated with 324 pages of evidentiary objections, consisting of 764 specific objections, 325 of which were directed to portions of plaintiff's declaration, many of which objections were frivolous. In all, defendants filed 1150 pages of reply.

Five thousand, four hundred, fifteen pages of material were before the trial, court, which following argument

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Our Supreme Court has explained that "The purpose of the 1992 amendment was 'to move summary judgment law' in this state 'closer' to its 'federal counterpart as clarified in Celotex, Anderson, and Matsushita, in order to liberalize the granting of such motions. [Citation.] The purpose of the 1993 amendment was to move it even closer. [Citation.] . . . [¶] Together the 1992 and 1993 amendments, which continue in effect to this day, have ' "changed" summary judgment law ' "dramatically." ' [Citations.]" (Aguilar v. Atlantic Richfield Co., supra, 25 Cal.4th at p. 848, fn. omitted.)

As a result of such liberalization, that dramatic change, trial courts began to grant summary judgments more frequently, which has been described as having a salutary effect, ridding the courts of cases truly lacking in merit. And many employment cases fit that description, with some counsel too often [178 Cal.App.4th 286] willing to file suit whenever an employee in a protected class suffers some adverse employment decision. Such cases should be disposed of as quickly and efficiently as possible.

On the other hand, since the summary judgment procedure has been removed from disfavored status, some judges and commentators have expressed concern that trial courts have

moved too far in the other direction. (E.g., Wald, Summary Judgment at Sixty (1998) 76 Tex. L.Rev. 1897 (Wald); Miller, The Pretrial Rush to Judgment (2003) 78 NYU L.Rev. 982.) And much of this concern has been expressed in particular reference to employment cases. (Beiner, The Misuse of Summary Judgment in Hostile Environment Cases (1999) 34 Wake Forest L.Rev. 71) fn. 22 .

[13] We take no position on this criticism, but do observe that many employment cases present issues of intent, and motive, and hostile working environment, issues not determinable on paper. Such cases, we caution, are rarely appropriate for disposition on summary judgment, however liberalized it be. fn 23 n the colorful language of Chief Judge Wald: "Its flame lit by Matsushita, Anderson, and Celotex. . . summary judgment has spread . . . through the underbrush of undesirable cases, taking down some healthy trees as it goes." (Wald, supra, 76 Tex. L.Rev. at p. 1941.) This, we cannot allow.

D. Summary Adjudication as to the Retaliation Claim Was Error as to United.

[14] Government Code section 12940, subdivision (h) provides that it is an unlawful employment practice "[f]or any employer . . . to discharge, expel, or otherwise discriminate against any person because the person has opposed [178 Cal.App.4th 287] any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part." "Employees may establish a prima facie case of . . . retaliation by showing that (1) they engaged in activities protected by the FEHA, (2) their employers subsequently took adverse employment action against them, and (3) there was a causal connection between the protected activity and the adverse employment action." (Miller v. Department of Corrections, supra, 36 Cal.4th at p. 472, citing Flait v. North American Watch Corp., supra, 3 Cal.App.4th at p. 476.)

Plaintiff alleged three causes of action for retaliation, as to which the trial court ruled as follows: "As to plaintiff's claims of retaliation, alleged as the fifth, sixth, and ninth causes of action, Defendants have made a prima facie showing of a legitimate non-discriminatory reason for terminating Plaintiff, which Plaintiff has failed to rebut by a prima facie showing of pretext and that the real reason was in retaliation. Thus, Defendants would be entitled to summary adjudication of these claims."

[15] This, too, was error, in light of our conclusion as to pretext. Likewise in light of our Supreme Court's observation that "Retaliation claims are inherently fact-specific, and the impact of an employer's action in a particular case must be evaluated in context. . . . [T]he determination of whether a particular action or course of conduct rises to the level of actionable conduct should take into account the unique circumstances of the affected employee as well as the workplace context of the claim." (Yanowitz, supra, 36 Cal.4th at p. 1052.)

That context, those unique circumstances, are discussed in detail above. Plaintiff had complained for years about numerous things--to Petersen and about Petersen. Such complaints are considered sufficient opposition to trigger the prohibition against retaliation. (California Fair Employment & Housing Com. v. Gemini Aluminum Corp. (2004) 122 Cal. App. 4th 1004, 1018; Passantino v. Johnson & Johnson Consumer Products, Inc. (9th Cir. 2000) 212 F.3d 493, 506 [formal or informal complaints to supervisor].) Plaintiff goes off on stress leave, and prior to his return Petersen asks him to voluntarily demote himself to mechanic. Plaintiff refuses and returns to work, to complain yet again, and be harassed yet again. And three weeks later he is fired, following a less-than-thorough investigation.

[16] Summary adjudication on the retaliation claims is

reversed as to United. There is, however, no individual liability for retaliation (Jones v. Lodge at Torrey Pines Partnership (2008) 42 Cal. 4th 1158, 1173), so the summary adjudication of these claims in favor of Petersen is affirmed. [178 Cal.App.4th 288]

E. Summary Adjudication of the Failure to Prevent Discrimination and Harassment Claim was Error

[17] "The employer's duty to prevent harassment and discrimination is affirmative and mandatory." (Northrop Grumman Corp. v. Workers' Comp. Appeals Bd. (2002) 103 Cal. App. 4th 1021, 1035.) Plaintiff's seventh cause of action alleged breach of that duty. Defendants' motion sought summary adjudication on the sole basis that there was no harassment or discrimination, which the trial court granted. In light of our conclusions regarding harassment and discrimination, summary adjudication of this cause of action must be reversed.

F. Summary Adjudication of the Infliction of Emotional Distress Claim was Error

[18] Plaintiff's 14th cause of action alleged intentional infliction of emotional distress. A claim for distress arising out of employment is "not barred where the distress is engendered by an employer's illegal discrimination practices." (Accardi v. Superior Court, supra, 17 Cal.App.4th at p. 352; accord, Watson v. Department of Rehabilitation, supra, 212 Cal. App. 3d 1271, 1286) Neither discrimination nor harassment is a normal incident of employment. (E.g., Jones v. Los Angeles Community College Dist., supra, 198 Cal. App. 3d 794, 805; Chin, supra, §§ 15:585-15:586, pp. 15-71-15-72 and authorities cited.) Again, our conclusions as to the discrimination and harassment claims compel reversal of the summary adjudication of this cause of action.

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